SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM— 1969

No. [redacted] 217

SAMUEL S. STARR, MEYER WEINBERG and EDWIN FRADKIN,

Petitioners,

vs.

HYDROCARBON CHEMICALS, INC., and its subsidiaries; BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKA HARBOR LAND COMPANY, INC., all New Jersey corporations,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWIN FRADKIN,
Attorney for Petitioners,
744 Broad Street,
Newark, New Jersey, 07102.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
I—	1
II—Citations to Opinion Below	2
III—Jurisdiction	2
IV—Questions Presented	3
V—Statutes and General Order Involved	3
VI—Statement of the Case	4
VII—Reasons for Granting Writ	5
VIII—Conclusion	9
APPENDIX:	
A—Opinion on Rehearing in Neiwirth, et al. v. Hydrocarbon Chemicals, Inc., et al.	1a
B—Order Vacating Judgment of U. S. Court of Appeals for the Third Circuit	17a
Judgment on Rehearing of the U. S. Court of Appeals	18a
C—Opinion of U. S. Court of Appeals for the Third Circuit in re: Neiwirth, et al., Hydrocarbon Chemicals, Inc., et al.	19a
D—Judgment of the U. S. Court of Appeals for the Third Circuit	33a
E—Opinion of the United States District Court, District of New Jersey	35a
F—Relevant Statutes	78a

PAGE

Case Cited

Milbank, Tweed & Hope v. McCue, 111 F. 2d 100 (2nd Cir. 1940) 8

Statutes Cited

Bankruptcy Act:

Sec. 62 3

Sec. 241 ..... 3, 8

Ch. X 3, 4, 7

Ch. XI 3, 4, 7, 8

Article XIII 8

11 U.S.C.:

Sec. 102 ..... 3, 8

Sec. 641 ..... 3, 8

28 U.S.C.:

Sec. 1254(1) 3

Other Authorities Cited

6A Collier on Bankruptcy (14 Ed.):

p. 938, Sec. 13.04(1) 8

8 Collier on Bankruptcy (14th ed.):

p. 949, Sec. 6.30 7

General Order 44 ..... 3, 5, 7

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I

Petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the cause on March 13, 1969.

II

Citations to Opinion Below

The most recent opinion of the United States Court of Appeals for the Third Circuit, was filed on March 13, 1969, subsequent to a reargument of this matter before the Court *en banc* and is printed as an appendix to this petition (1a). This opinion and the accompanying judgment affirmed the judgment of the United States District Court for the District of New Jersey and vacated the judgment of the United States Court of Appeals for the Third Circuit previously filed on June 10, 1968.

The original opinion of the United States Court of Appeals for the Third Circuit was filed on June 10, 1968, subsequent to the initial argument and is printed as an appendix to this petition (19a). This opinion and the accompanying judgment reversed the judgment of the United States District Court for the District of New Jersey, and ordered the matter remanded for proceedings not inconsistent with said opinion.

The Memorandum and Order of the United States District Court for the District of New Jersey, dated May 16, 1967, is printed as an appendix to this petition (35a).

III

Jurisdiction

The judgments of the United States Court of Appeals for the Third Circuit which these petitioners seek to have reviewed were entered on March 13, 1969, and consist of (a) a judgment ordering that the prior judgment of said Court, filed June 10, 1968, be vacated; and (b) a judgment ordering that an order of the United States District Court for the District of New Jersey, dated May

16, 1967, be affirmed (17a and 18a). This matter was the subject of a reargument before the United States Court of Appeals for the Third Circuit, said reargument having been ordered by said Court.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

IV

Questions Presented

(1) Does General Order 44 in Bankruptcy provide that no attorney for a debtor who is not in possession shall be appointed except upon order of the court?

(2) Does the Circuit Court of Appeals have the right and power to modify and expand the clear language of General Order 44 in Bankruptcy so as to require that no attorney for a debtor who is not in possession shall serve and be compensated except upon order of the court?

(3) Does the court in a Chapter X reorganization have the right and power to compensate a debtor's attorney, who was not formally appointed by the court, for services rendered in a Chapter XI proceeding where said services also benefit the subsequent Chapter X reorganization?

(4) Shall a debtor in a Chapter XI proceeding who is not in possession be required to utilize as its attorney only such attorney as may be appointed upon order of the court?

V

Statutes and General Order Involved

The statutory proceedings involved are Sec. 62 of the Bankruptcy Act, 11 U.S.C., Sec. 102 (78a); Sec. 241 of the Bankruptcy Act, 11 U.S.C., Sec. 641 (81a); General Order 44 in Bankruptcy (5a see footnote).

VI

Statement of the Case

Petitioners are members of the New Jersey bar, specializing in the field of federal income taxation.

The within matter arose in connection with a proceeding concerning Hydrocarbon Chemicals, Inc. and certain of its wholly owned subsidiaries. The action was instituted as a proceeding under Chapter XI of the Bankruptcy Act, and was eventually removed to a proceeding under Chapter X of the Bankruptcy Act. As indicated by the United District Court in the Memorandum and Order, dated May 16, 1967, the "matter has a long and tortuous history." (35a).

Petitioners were retained by the debtor corporation through its attorney for the purpose of assisting the debtor in removing a jeopardy assessment for Internal Revenue taxes, filed by the United States of America. A plan of arrangement under Chapter XI was proposed by the debtor, and certain aspects of this plan and matters collateral thereto were remanded to the Honorable William H. Tallyn, Referee in Bankruptcy, for findings in connection therewith.

Petitioners prepared a memorandum of law concerning the validity of the jeopardy assessment, and petitioner Edwin Fradkin testified before Referee Tallyn concerning the validity of said assessment. The efforts of the petitioners in this regard were successful, and resulted in the removal of a jeopardy assessment in the sum of $1,250,000.00 (15a). Although the Chapter XI proceeding was eventually removed to a proceeding under Chapter X, it should be noted that in the Chapter X proceeding the benefits of the removal of the jeopardy assessment were, of course, enjoyed by the debtor and its various creditors and stockholders.

Petitioners filed an Application for Allowances and sought fees and allowances in the total sum of $5,000.00. In the Memorandum and Order of the United States District Court, dated May 16, 1967 (35a), the United States District Court denied the application of the petitioners, and stated that the petitioners were not entitled to "any compensation from [this] Court on account of their failure to comply with the requirements of General Order 44." (53a). In denying the application of the petitioners, the District Court made the following comments regarding the efforts of the petitioners:

> "* * * While I have some reservation about the extent and value of these services, it is unnecessary to evaluate them. * * *" (53a)

It is important to note that the opinion and judgment of the United States Court of Appeals for the Third Circuit, filed and entered on March 13, 1969, concerned an Application for Allowances made by these petitioners, and also concerned an Application for Allowances made by one Leo Neiwirth (United States Circuit Court of Appeals for the Third Circuit No. 16788). The said Leo Neiwirth has also filed a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit in order to review the judgments and opinion of the United States Circuit Court of Appeals for the Third Circuit, dated March 13, 1969. Petitioners' matter and the matter regarding Mr. Neiwirth have been treated by the Court of Appeals as companion cases.

VII

Reasons for Granting Writ

Initially, it should be noted that the dissenting opinion written by Chief Judge Hastie and filed on March 13,

1969 (11a) sets forth succinctly and concisely the legal contentions of the petitioners. In the interest of brevity, the arguments presented therein will not be repeated at length in this petition.

(1) This matter has been the subject of conflicting decisions rendered by the United States District Court and the Court of Appeals. Initially, the United States District Court denied the petitioners the allowances and fees they sought (53a) in the Memorandum and Order, dated May 16, 1967. The matter was then heard by the Circuit Court of Appeals, and this initial hearing resulted in a judgment dated June 10, 1968, which reversed the judgment of the District Court and remanded the matter for proceedings not inconsistent with the opinion (33a). Circuit Judge Ganey wrote a dissenting opinion.

A reargument of this matter was then permitted by the Circuit Court of Appeals. After reargument the Circuit Court of Appeals ordered that the judgment of that Court, filed June 10, 1968, be vacated; and further ordered that the Order of the District Court, filed May 16, 1967, be affirmed (17a and 18a). It is interesting to note that the decision of the Court which resulted in the judgments or orders of March 13, 1969 was a five-to-three decision. The majority opinion was written by Circuit Judge Ganey with the concurrence of Circuit Judge Van Duzen, and (although not specifically indicated) apparently the concurrence of Circuit Judge Kalodner. Circuit Judge Freedman concurred in the judgment, but wrote a separate opinion. Circuit Judge Seitz also concurred in the judgment, but wrote still another concurring opinion, which opinion was concurred in by Circuit Judge Van Duzen. Chief Judge Hastie wrote a dissenting opinion, which was concurred in by Circuit Judges Aldisert and Stahl.

It is apparent that although a decision was ultimately reached by the Court, the matter under consideration was apparently a perplexing one, and one which petitioners suggest should be settled by this Court.

(2) The effect of the majority opinion, filed March 13, 1969, is to modify the language of General Order 44 (5a). General Order 44 clearly and concisely states that "[No] attorney for a receiver, trustee or debtor in possession shall be appointed except upon order of the court, * * *" (5a). It is clear that the quoted language does not include an attorney for a debtor who is not in possession. A careful distinction must be drawn between a debtor and a debtor in possession. 8 *Collier on Bankruptcy*, p. 949, Sec. 6.30 (14th ed.).

In this matter a receiver was appointed during the Chapter XI proceeding (66a) and co-trustees were appointed in the Chapter X reorganization (60a). The petitioners did not act as attorneys for the receiver, trustee, or debtor in possession, but rather served as attorneys for a debtor who was not in possession. The petitioners were therefore not required to comply with General Order 44. However, notwithstanding the express language of General Order 44, the Circuit Court of Appeals has denied petitioners any allowance because of their failure to comply with the same. The Circuit Court of Appeals has apparently appropriated unto itself the task of promulgating, or at least amending, the General Orders in Bankruptcy. This is a departure from the accepted and usual course of judicial proceedings, and requires an exercise of this Court's review.

(3) Research has failed to reveal any previously decided cases which indicate that court approval of the appointment of counsel for a debtor who is not in possession is a precondition or prerequisite to compensation

being allowed such counsel. (See similar comments in the dissent of Chief Judge Hastie (18a).) Further, the right of a court to allow compensation to an attorney for a debtor not in possession is a right which is well founded in law and in actual practice. *Milbank, Tweed & Hope v. McCue,* 111 F. 2d 100 (2nd Cir. 1940). The rule in this regard has also been concisely stated in 6A *Collier on Bankruptcy,* p. 938, §13.04[1] (14th ed.).

Section 241 of Article XIII of the Bankruptcy Act, 11 U.S.C. 641 gives a judge express authority to allow compensation for services rendered by "the attorney for the debtor" (81a) in a Chapter X proceeding while, as stated by Chief Judge Hastie in his dissent, "though Chapter XI itself contains no comparable provision, the general provisions of section 62, 11 U.S.C. §102, apply and authorize the compensation of a debtor's attorney in a Chapter XI arrangement. Application of Pinetree Associates, E. D. N. Y. 1948, 77 F. Supp. 270." (12a)

It is, therefore, apparent that the Circuit Court of Appeals has decided an important question of federal law in a way which is in conflict with applicable, existing decisions; or, at the very least, has decided an important question of federal law which has not been, but should be, settled by this Court.

(4) Chapter XI proceedings are unique in that they are essentially proceedings wherein the subject corporation seeks, through its own energies and activities, to rearrange its assets and liabilities, and to avoid a financial disaster or a liquidation. It is generally the initiative of the debtor and its attorneys and advisors that leads to an acceptable plan of arrangement. If the majority opinion were to be adhered to in all future Chapter XI proceedings, then a petitioning debtor could not utilize or avail itself of its own attorney in the all-important task of cre-

ating a workable plan, but would be compelled to utilize the services of an attorney selected or approved by the court. This certainly is a procedure which contravenes the spirit, intent and purpose of Chapter XI proceedings. Such a concept is so contrary to public policy and prior judicial practice that it should be the subject of review by this Court.

VIII

CONCLUSION

For the foregoing reasons, petitioners contend that their petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWIN FRADKIN,
Attorneys for Petitioners,
744 Broad Street,
Newark, New Jersey.

June 2, 1969

[APPENDIX FOLLOWS]

APPENDIX A

Opinion on Rehearing in *Neiwirth, et al. v. Hydrocarbon Chemicals, Inc., et al.*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 16787 and 16788

In the Matter of

HYDROCARBON CHEMICALS, INC. and its subsidiaries BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKE HARBOR LAND COMPANY, INC., all New Jersey corporations, Debtors,

LEO NEIWIRTH, Esquire,

Appellant in No. 16787

SAMUEL S. STARR, Esquire, MEYER WEINBERG, Esquire, and EDWIN FRADKIN, Esquire,

Appellants in No. 16788.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued January 19, 1968 Reargued November 26, 1968

Before: HASTIE, *Chief Judge*, KALODNER, GANEY, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT and STAHL, *Circuit Judges*.

Appendix A

Opinion of the Court

(Filed—March 13, 1969.)

By Ganey, *Circuit Judge.*

The appellants here are claiming compensation for services allegedly beneficial to the bankrupt estate rendered as attorneys for the debtor. Robert Friedlander who, for reasons not relevant here, was denied all compensation in connection with the proceedings, filed a petition under Chapter XI and, as counsel for the debtor, employed Lee Neiwirth, Samuel S. Starr, Meyer Weinberg and Edwin Fradkin as his counsel in connection therewith. At the inception of the proceedings under Chapter XI, Harry A. Margolis was appointed receiver on the 10th day of July, 1963, and filed a bond in the sum of $100,000. Paragraph 8 of the order provides: "Said Receiver be and he is hereby authorized to operate the businesses and manage the property of said Debtors until the further order of the Court." Paragraph 9 thereof provides: "That without in any way limiting the generality of the foregoing, said Receiver shall have full power and authority under the further order of this Court . . . (g) . . . to do such other acts in the continuance of the business and preservation of same as he shall deem for the best interests of this estate and its creditors."

On the same day, July 10, 1963, the court empowered the receiver to retain the firm of Kleinberg, Moroney & Masterson as his attorneys. In the petition for their appointment, paragraph 3, "That he has selected the aforesaid firm of Kleinberg, Moroney & Masterson because said attorneys are known to him to be experienced and thor-

oughly competent to perform their duties as attorneys to your petitioner in the administration of the estate of the above named Debtors." In a petition dated July 19, 1963, in paragraph 3 thereof, "Said firm of Kleinberg, Moroney & Masterson did thereupon enter upon the performance of their duties as attorneys for your petitioner, but your petitioner subsequently ascertained that the intricacies and complexities of the corporate sructures and the affairs and transactions of the Debtors require that your petitioner be authorized to retain the services of an additional attorney so that he will have the benefit of Co-Attorneys in the within proceeding."

In paragraph 5, the petitioner stated, "That he has selected the aforesaid firms of Kleinberg, Moroney & Masterson and Crummy, Gibbons & O'Neill because said attorneys are known to him to be experienced and thoroughly competent to perform their duties as Attorneys to your petitioner in the administration of the estate of the above named Debtors." This order appointing additional counsel was entered on the 19th day of July, 1963.

On the 19th day of July, 1963, the receiver presented a petition to the court to appoint an accountant "to conduct certain audits and investigations in connection with the business of the debtor corporations, their books and records." and on that date, Pogash & Co. was appointed as accountant to assist in the preparation of their work. At no time during the Chapter XI proceeding did any of the appellants employed by counsel for the debtor, Robert Friedlander, receive the approval of the court even though, as has been indicated, the receiver had retained two firms as co-counsel for the receiver, as well as an accountant to aid in the proceedings.

After some five months of futile attempts to reorganize the situation under Chapter XI, all proceedings thereun-

der were abandoned and a petition to proceed solely under Chapter X was filed. The services which had been performed by the appellants, counsel to the counsel for the debtor, were in good part used in the Chapter X proceeding, although a trustee and counsel were likewise appointed under the Chapter X proceeding.

We would deny compensation on the ground alone that there is no provision in the Bankruptcy Act for paying more than one fee to counsel for the debtor, nor is there any provision in the Act for employment of other counsel for the counsel for the debtor unless he compensates them himself. Here, there was no necessity whatsoever for counsel for the debtor employing counsel without the approval of the court when he was not a debtor in possession and there was a receiver who, as has been indicated, employed as co-counsel two reputable firms of lawyers, as well as an accountant, and later a trustee was appointed with counsel, since the work performed by the counsel to the counsel for the debtor in connection with the proceedings was the work properly of counsel for such receiver and such trustee. The work of eliminating the tax lien here was clearly the work of the counsel for the receiver and his counsel under Chapter XI, as well as the work of the trustee and his counsel, since it was in aid of the proper administration of the estate, looking to its preservation and clearly within the powers of the receiver and trustee under the orders of the court.

Furthermore, counsel for the counsel for the debtor never secured court approval for their services allegedly beneficial to the estate in the Chapter X proceeding and at the close thereof, Starr, Weinberg and Fradkin, the appellants, presented their bill to the counsel for the debtor and

upon not being paid then presented their bill to the court for their services rendered. It seems that the appellants here were under the impression that they were to be paid by the counsel for the debtor since he presented a bill for $125,000 for his services and a scrutiny of the record shows that a far greater portion of the services performed were done by the appellants than by counsel for the debtor. In effect, during the Chapter X proceedings, the services which had been performed under the Chapter XI proceedings and were used in the Chapter X proceedings by the appellants, rendered them at least de facto counsel for the trustee and as such they were acting without the approval of the court, which is required under a Chapter X proceedings. This is most essential in order that the court may know the type of individual who is engaged in the proceeding, their integrity, their experience in connection with work of this type, as well as their competency concerning the same. In so doing, they were, in effect, operating under General Order 44 Bankruptcy.[1] It is well-

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[1] General Order 44 in Bankruptcy reads as follows:

APPOINTMENT OF ATTORNEYS

No attorney for receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters

(*Footnote continued on following page*)

settled that unless counsel have been approved by the court, though their services were of value to the court in a Chapter X proceeding, they must be denied compensation. This Court, speaking through Judge Maris, in *In re National Tool & Mfg. Co.*, 209 F. 2d 256, 257, stated as follows: "It is clear that General Order 44 applies to reorganization proceedings under Chapter X of the Bankruptcy Act. It is equally clear that Mr. Mode was not appointed as an attorney for the trustees of the debtor in the manner required by General Order 44. It is settled that under these circumstances an attorney may not be com-

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(*Footnote continued from preceding page*)

upon which he is to be engaged, and that his employement would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

pensated out of the debtor's estate even though he may have rendered valuable services to the trustees. It follows that the district court was without authority to make the order appealed from." In *In re Progress Lektro Shave Corp.*, 117 F. 2d 602, the court stated, in denying compensation to counsel: "There is no question but that the appellant acted throughout in good faith and a denial to him of compensation is a harsh conclusion. However, the law is unquestionably settled that the order of the district court was correct." *Gochenour* v. *Cleveland Terminals Building Co.*, 142 F. 2d 991, 993, cert. denied 323 U. S. 767; *Albers* v. *Dickinson*, 127 F. 2d 957; *Butcher* v. *Leavenworth State Bank*, 184 F. 2d 498; *In re Pedisick*, 103 F. Supp. 199; *In re Robertson*, 4 F. 2d 238 (3rd Cir.).

That the gaining of the necessary approval of the court was a requisite, there can be no doubt, since the final sentence of Section 328 of the Bankruptcy Act, 11 U. S. C., states: "Upon the filing of such amended petition, or of such creditors' petition, and the payment of such additional fees as may be required to comply with section 132 of this Act, such amended petition or creditors' petition shall thereafter, *for all purposes of Chapter X of this Act*, be deemed to have been originally filed under this chapter." (Emphasis supplied.) It is obvious that the language of this section is explicit, plain and unambiguous and the appellants, experienced attorneys, as attorneys for the debtor, knowing that the matter was in a Chapter X proceeding, should have in this proceeding likewise sought the approval of the court for the services which were to be utilized as the basis for the plan to be approved under Chapter X since their fees were to come out of the fund realized under the Chapter X proceeding.

It cannot be stressed too strongly here that, while the result reached is, as has been indicated above, "a harsh conclusion", nevertheless, counsel who have performed services, especially under Chapter X of this proceeding, should seek the approval of the court for otherwise, as counsel for the debtor, the court has no control whatsoever over them and it is imperative that their competency, experience and integrity therefor have the approbation of the court. Cf. *United States* v. *Larchwood Gardens*, December 12, 1968, 3rd Circuit, Nos. 16,886 and 16,887.

The judgment of the lower court will be affirmed.

Judge Van Dusen concurs in the foregoing opinion.

FREEDMAN, *Circuit Judge*, concurring.

I join in the affirmance of the judgment of the district court.

At the rehearing before us it was agreed that the services rendered by appellants consisted of the settlement of claims of creditors and the removal of the government's jeopardy assessment. These were clearly among the duties of the receiver which should have been performed by him and his attorneys.

The allowance of fees to counsel for the debtor in such circumstances would subvert the phophylactic purpose of General Order 44. A debtor out of possession usually has an attorney, but in my view the receiver and his attorney may not by abdicating their function open the door to its performance by the debtor's attorney whose appointment was not approved by the court. If the benefit to the estate is made the decisive test, it will inevitably encourage the

receiver and his court-approved attorney to slacken in their duty, knowing that someone else will perform it for them.

I believe that the relevant portions of the Bankruptcy Act and the policy underlying General Order 44, which are discussed in the comprehensive opinion of Judge Ganey, forbid compensation to an attorney for a debtor out of possession where a receiver and his court-approved counsel have had conferred upon them the full authority to perform those services, even though they permit them to be performed instead by the attorney for the debtor.

I therefore join in the affirmance of the judgment of the district court holding that it had no power to award compensation to the debtor's attorneys even though their services benefited the estate.

SEITZ, *Circuit Judge*, concurring.

I would affirm the judgment of the district court but based on a different approach.

The order appointing the receiver in the Chapter XI proceedings vested him with possession of the assets and full administrative power. Indeed, it explicitly provided that he was not to be a "mere Custodian". See §48(a)(2) of the Bankruptcy Act (11 U. S. C. A. §76(a)(2); see also §2-(a)(3) of the Act (11 U. S. C. A. §11(a)(3)). Subsequent orders of the referee appointed two sets of attorneys to represent the receiver generally. Accountants were also appointed by order of the referee.

The effect of these orders was not only to give to the receiver full control of the operation and administration of the debtor corporation under Chapter XI but also to

provide him with the necessary legal and accounting assistance to discharge his duties. These duties would certainly include examining and settling creditors' claims and negotiating the removal of the government's jeopardy assessment, which were the services allegedly performed by these appellants. Thus, the appellants necessarily performed the alleged services for the benefit of the receivership estate and not for the debtor out of possession. General Order 44 requires, inter alia, court appointment of attorneys who do work for the receiver. The employment of appellants was admittedly not authorized by the court. Therefore, appellants were not entitled to be compensated from the estate for failure to comply with General Order 44.

I recognize that the result is harsh, but necessary if the strong policy considerations underlying the requirement of strict compliance with General Order 44 are to be implemented. A similar result in a Chapter X context, for failure to comply with the order was reached by this court in In re Nat'l. Tool & Mfg. Co., 209 F. 2d 256 (1954). The rationale of that case seems equally applicable in a Chapter XI context under the circumstances of this case.

I find it unnecessary to consider the correctness of the position advanced by the S. E. C. that where the powers of the Receiver are vague, the attorney for a debtor out of possession may be compensated for non-duplicative work done in the undefined area. I say this because a reading of the referee's orders makes it clear that rather than being vague the receiver's powers fully encompassed the area of service for which appellants seek compensation.

Judge Van Dusen concurs in the foregoing opinion.

Appendix A

HASTIE, *Chief Judge*, with whom ALDISERT and STAHL, *Circuit Judges*, join, dissenting.

In controversy here are applications for compensation made in a reorganization proceeding under Chapter X of the Bankruptcy Act for services rendered by attorneys during a preceding Chapter XI proceeding. The economic benefit of the services is said to have been realized by the bankrupt state in the Chapter X reorganization, but the district court concluded as a matter of law that it lacked authority to allow the requested compensation. Thus the question now presented is not whether in the exercise of equitable discretion the court should or probably would have awarded compensation but merely whether it had power to do so.

In the Chapter XI proceeding the court had appointed a receiver who, with the court's approval, had retained attorneys. Thereafter, the claimants were retained by the debtor's attorney to render special legal services designed to facilitate the proposed arrangement. Pending discussion of the point later in this opinion, it will be assumed that for purposes of compensation the claimants became and should be treated as attorneys for the debtor.

It is the position of a majority of this court that the fact that the employment of the claimants was not authorized by the bankruptcy court made it unlawful for that court to award them any compensation out of the debtor's estate. With that conclusion I disagree.

Undergirding the majority position is the provision of General Order 44 in Bankruptcy, admittedly applicable to Chapter X, that "no attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court." But on its face this provision does not

cover an attorney for a debtor who is not in possession. See 8 COLLIER, BANKRUPTCY, 14th ed. 1966, 716. And there is no valid reason that it should. General Order 44 is designed to enable a bankruptcy court to prevent court officers who are administering an insolvent estate from burdening the estate with compensation of unneeded professional personnel. See *Widett* v. *D'Andria*, 1st Cir. 1957, 241 F. 2d 680, 682. This control is needed because an attorney for a trustee, receiver or debtor in possession is entitled to reasonable compensation for work he is authorized to perform in due course of the administration of the estate, even though the estate has not been enriched by his services.

In contrast, a debtor not in possession does not function as an officer of the court, and neither does his attorney. The court is not concerned with and has no authority over the debtor's appointment of counsel as in his view his situation may require. At the same time the work of such counsel may materially benefit the estate and to that extent only may be and, on proper petition, normally is compensated from the estate. *In re Prudence*, 2d Cir. 1938, 96 F. 2d 157; *Vermilion Bay Land Co.* v. *Fitzgerald*, 6th Cir. 1946, 157 F. 2d 640; *Greensfelder* v. *St. Louis Public Service Co.*, 8th Cir. 1940, 114 F. 2d 53, cert. denied sub nom. *Stein* v. *St. Louis Public Service Co.*, 311 U. S. 714; *In re Ritz Carlton Hotel & Restaurant Co.*, D. N. J. 1943, 60 F. Supp. 861; see *In re McGann Mfg. Co.*, 3d Cir. 1951, 188 F. 2d 110, 112. Indeed, for Chapter X proceedings section 241 of the Bankruptcy Act, 11 U.S.C. §641, expressly authorizes compensation for attorneys for debtors. And though Chapter XI itself contains no comparable provision, the general provisions of section 62, 11 U.S.C. §102, apply and authorize the compensation of a debtor's attorney in a Chapter XI arrangement. *Appli-*

cation of Pinetree Associates, E. D. N. Y. 1948, 77 F. Supp. 270.

None of the cases cited above, and none that research has discovered, even suggests that court approval of the appointment of the debtor's counsel is prerequisite to judicial approval of compensation measured by the value of the attorney's services to the estate. Indeed, in some cases compensation includes the value to the estate of services rendered by the attorney for the debtor even before the court acquired jurisdiction through the filing of a Chapter X or Chapter XI proceeding. *In re Prudence, supra; Stein v. Henker*, 8th Cir. 1946, 157 F. 2d 740.

The foregoing considerations lead to the conclusion that a bankruptcy court in a Chapter X reorganization has ample power to compensate a debtor's attorney, who has been retained and has served without judicial authorization, for services rendered in connection with a preceding Chapter XI proceeding with value redounding to the estate in the Chapter X reorganization.

Heretofore, it has merely been assumed that legal power to compensate the attorney for the debtor includes power to pay for services actually rendered by attorneys retained in the debtor's interest by the attorney for the debtor. Since the determinant of power to compensate the debtor's attorney is the value of services to the estate, it would be technicality without justifying purpose to deny such power with reference to similarly valuable work performed by assisting counsel. Moreover, in this case any technical requirement seems to be satisfied and any danger of duplicating claims minimized by the filing of the claims of the appellants through the attorney for the debtor and in conjunction with his own claim. The one case that has been found in which a court considered

such a situation resulted in the allowance of compensation for the assisting attorney in the present appellant's position. *Application of Pinetree Associates, supra.*

It remains to consider the contention advanced in the concurring opinion that the receiver's authority was broad enough so that he, through his own court approved attorney, might have rendered the services which the present claimants performed at the behest of the debtor. Therefore, it is argued, the present claimants should be treated as intermeddling volunteers, denied any judicial award of compensation out of the debtor's estate, and thus discouraged from exercising such initiative as this case disclosed.

I disagree with this reasoning because I think it does not sufficiently take into account significant differences between an ordinary bankruptcy, administered by a court-appointed trustee, and a debtor proposed Chapter XI arrangement in which a receiver has been appointed.

When ordinary bankruptcy is decreed, the bankrupt's estate is irretrievably lost to him and all that remains to be done is the disposal and distribution of his assets for the benefit of creditors. He has no responsibility for and no active role in this essentially judicial function. But in a Chapter XI arrangement petition an embarrassed debtor is asking the court's assistance in his efforts so to rearrange his affairs that he will salvage some significant part of his estate while making acceptable provision for his creditors. Even though custody of the debtor's assets and the management of his business may temporarily be entrusted to a receiver during the pendency of the arrangement proceeding, the debtor's continuing activity and initiative are contemplated and required if the arrange-

ment he has proposed is to succeed. Ordinarily, he participates actively in making his proposals workable and acceptable to creditors. Indeed, negotiations with creditors are not likely to succeed without his initiative and active participation. If the plan must be revised, it is his responsibility to do so. If new financing must be obtained, he usually must seek it. If particular impediments to creditor acceptance can be removed or surmounted, he may properly try to accomplish this result.

Much of a debtor's activity in shaping and reshaping a plan and in removing impediments to its acceptance by creditors is lawyer's work properly entrusted to the debtor's attorney. This case presents a good example. A jeopardy tax assessment in the amount of $1,250,000.00 had been levied by the United States against the debtor. Believing that this assessment was not justified, the attorney for the debtor retained a firm of tax law experts, one of the present claimants, to attempt to remove this obviously serious impediment to any acceptable arrangement. This effort was notably successful, resulting in a removal of the jeopardy assessment and a reduction of the government's tax claim to $37,026.10.

The other attorney who is an appellant here, also acting pursuant to employment by the debtor's attorney, claims to have succeeded in reducing or eliminating some 600 claims against the debtor. Again, such improvement of the debtor's financial situation was an appropriate way of aiding the debtor's effort to accomplish an arrangement acceptable to creditors.

It is recognized that, while the debtor had a vital interest in thus facilitating his proposed arrangement, the elimination of claims is also a legitimate concern to the receiver in his temporary management and administration

of the estate pending arrangement. We do not know why the receiver took no initiative in these matters in this case. We do know that the debtor was properly concerned to eliminate or reduce claims, the existence of which necessarily made an arrangement more difficult. On the present record, it cannot properly be decided that the debtor was an intermeddler in his successful initiative exercised through the present lawyer claimants. On an examination of all of the relevant circumstances, the district court might well conclude that the debtor's action was proper and of such value to the estate that the attorneys who did the work should be compensated out of the estate. It is also possible that there were circumstances which would justify a contrary result. But, in my view, that determination should be made by the district court in the exercise of equitable power and discretion.

Finally, the concurring opinion takes the position that this case is like *In re Tool & Mfg. Co.*, 3d Cir. 1954, 209 F. 2d 256. But in that case compensation was sought by a Chapter X trustee's attorney whose appointment had not been approved by the court. That appointment violated the express mandate of General Order 44. It has been explained earlier in this opinion that General Order 44 does not cover the attorney for the debtor not in possession and that the court should not extend the requirement of court approval beyond the Order's terms to the appointment of the debtor's attorney.

For these reasons I would vacate the order of the district court and remand the cause with instructions to consider and adjudicate the appellants' claims on their merits.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX B

Order Vacating Judgment of U. S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16,787 AND 16,788

In the Matter of HYDROCARBON CHEMICALS, INC. and its subsidiaries BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKA HARBOR LAND COMPANY, INC., all New Jersey corporations, Debtors,

LEO NEIWIRTH, ESQUIRE,

Appellant in No. 16,787.

SAMUEL S. STARR, ESQUIRE, MEYER WEINBERG, ESQUIRE and EDWIN FRADKIN, ESQUIRE,

Appellants in No. 16,788.

(D. C. Bankruptcy No. 73-63)

Present:

HASTIE, *Chief Judge*, and KALODNER, GANEY, FREEDMAN, GEITZ, VAN DUSEN, ALDISERT and STAHL, *Circuit Judges*.

In accordance with the opinion of the Court on Rehearing filed this day,

Appendix B

It is ORDERED that the judgment of this Court filed June 10, 1968, in the above-entitled cases be and the same is hereby vacated.

By the Court,

KALODNER,
Circuit Judge

Dated: March 13, 1969.

Judgment on Rehearing of the U. S. Court of Appeals

Present: HASTIE, *Chief Judge* and KALODNER, GANEY, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT and STAHL, *Circuit Judges.*

This cause came on to be reheard on the record from the United States District Court for the — District of New Jersey and was reargued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed May 16, 1967, be, and the same is hereby affirmed. Costs taxed in favor of Appellee, Elliott I. Clemence, Trustee, and against Appellants.

Attest:

THOMAS F. QUINN,
Clerk

March 13, 1969

APPENDIX C

Opinion of U. S. Court of Appeals for the Third Circuit in re: *Neiwirth, et al., Hydrocarbon Chemicals, Inc., et al.*

(Filed—June 10, 1968)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 16787 & 16788

IN THE MATTER OF

HYDROCARBON CHEMICALS, INC and its subsidiaries BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKA HARBOR LAND COMPANY, INC., all New Jersey Corporations, Debtors,

LEO NEIWIRTH, ESQUIRE,

Appellant in No. 16787

SAMUEL S. STARR, ESQUIRE, MEYER WEINBERG, ESQUIRE, and EDWIN FRADKIN, ESQUIRE

Appellants in No. 16788

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix C

Argued January 19, 1968

Before HASTIE, *Chief Judge*, GANEY, *Circuit Judge*, and WEINER, *District Judge*

By WEINER, *District Judge*

At issue here is the propriety of the applications made by appellants Leo Neiwirth, Esq., and Starr, Weinberg & Fradkin, Esqs. (hereinafter, "Fradkin") to the district court below for allowances for legal services performed while appellants were working for the debtor corporation, Hydrocarbon Chemicals, Inc. The work was done for the debtor during the time it was in arrangement proceedings under Chapter XI of the Bankruptcy Act, prior to the transfer to corporate reorganization proceedings under Chapter X.

Appellants ask for what they claim is reasonable compensation for fruitful services rendered as attorneys for the debtor and allegedly benefitting the estate. Appellee-trustee contends, however, that General Order 44 renders any compensation to appellants contingent upon their having received prior authorization from the court in their appointment.

The district court below approved this argument. On this appeal, appellants advance the view that prior court approval was not prerequisite here for them to look directly to the estate for their compensation. Upon reconsidering the matter, appellee Securities and Exchange Commission has reversed the position it took in the proceedings below, and now agrees with appellants. On this dispute, therefore, issue is joined.

Appendix C

General Order 44 was promulgated by the Supreme Court under the authority conferred, prior to October 3, 1964, by §30 of the Bankruptcy Act, 11 U.S.C. §53 (repealed); *cf.* 28 U.S.C. §2075. Like all the General Orders in bankruptcy, General Order 44 has the force and effect of law, 2 Collier, Bankruptcy ¶30.02 (14th ed. 1966). It provides, in pertinent part, that "[n]o attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court . . ." 11 F.C.A. App. at 534; 4A Collier, Bankruptcy at 1543 (14th ed. 1967).

The debtor corporation, for whom appellants were performing their services, was admittedly none of the parties enumerated in the statute. In particular, since during the Chapter XI arrangement proceedings there was a receiver appointed, the debtor corporation was not then a "debtor in possession", see §342 of the Bankruptcy Act, 11 U.S.C. §742. In such a situation, we are cautioned, "[c]areful distinction must be drawn between a debtor and a debtor in possession," 8 Collier, Bankruptcy ¶6.30, at 949 *et seq.* (14th ed. 1966). Furthermore, the treatise notes, "General Order 44 does not apply to an attorney for a debtor not in possession . . ." *Id.* ¶5.34 (2.6), at 716.

To overcome this obstacle, appellee-trustee asserts that §328 of the Bankruptcy Act, 11 U.S.C. §728, renders General Order 44 applicable through its provision relating the later Chapter X proceeding back to the date of filing the initial Chapter XI arrangement. Section 328 was newly added to the general scheme of the Chandler Act on July 7, 1952. It provides for the transfer of proceedings from Chapter XI to Chapter X in appropriate cases, wherein the judge may, upon application of the S.E.C. or any party in interest, enter an order dismissing the Chapter XI arrangement unless, within a time set by the judge,

the petition be amended to comply with the requirements of Chapter X. Specifically, the section concludes, in pertinent part: "Upon the filing of such amended position, . . . [the] petition . . . shall thereafter, for all purposes of chapter 10 of this title, be deemed to have been originally filed under such chapter." This is the language urged by appellee-trustee as bringing into play the prior authorization required by General Order 44, thus allegedly prohibiting compensation for appellants' services because of their fatal non-compliance with this requirement.

Appellee-trustee advances his conclusion as the third step of a syllogism. In the first place, §328 is urged as constructively transforming ex post facto the dual proceedings which had their abortive birth under Chapter XI into an effectively single Chapter X bankruptcy proceeding. Secondly, this argument continues, in a Chapter X reorganization the trustees have the exclusive statutory duty to "examine all proofs of claim and object to the allowance of such claims as may be improper . . ." §47a (8) of the Bankruptcy Act, 11 U.S.C. §75(a)(8). Hence, this reasoning concludes, appellants' services were within the scope of what the trustees appointed in the Chapter X proceeding had the duty to perform, and therefore appellants were, in function at least, unauthorized attorneys for the trustees.

Such an argument must necessarily stand or fall on its major premise. The legislative history of §328 shows simply that it was intended as a means of transition from Chapter XI to Chapter X proceedings fairly symmetrical in effect to §147 of the Bankruptcy Act, 11 U.S.C. §547, which provides for the converse transfer, H.R. Rep. No. 2320, 82d Cong., 2d Sess., in 2 U.S. Code Cong. & Ad. News 1979-80 (1952). The provision effecting a relation

back appears particularly aimed at remedying the evil encountered in *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434 (1940). There, in the words of the House Committee Report, "the petition under chapter XI was dismissed after the proceeding had been running for many months and a proceeding had to be started anew under chapter X," 2 U. S. Code Cong. & Ad. News 1980 (1952).

Congressional attention appears to have been focused upon sparing petitioners the useless agony of needlessly duplicating work already accomplished under an aborted Chapter XI proceeding in the subsequent Chapter X reorganization. It does not seem to have been the purpose of Congress to place contingencies, after the fact, upon the compensation for services performed in good faith under Chapter XI which would otherwise have applied, only, with forewarning, to situations originating under Chapter X.

In view of the dearth of pertinent judicial commentary on this amendment of recent vintage, and mindful of the fact that "[t]here is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction," *Bank of Marin* v. *England*, 385 U. S. 99, 103 (1966); Bankruptcy Act §2a, 11 U.S.C. §11(a), we cannot construe §328, together with General Order 44, to import the requirement of prior court authorization in a Chapter XI arrangement where General Order 44 does not in terms apply, merely on the grounds of a subsequent transfer to Chapter X proceedings which "shall thereafter, for all purposes of chapter 10 of this title [11], be deemed to have been originally filed under such chapter," in the words of §328 of the Bankruptcy Act, 11 U.S.C. §728. To extend the reach of General Order 44 to attorneys be-

yond its express terms on the strength of subsequently appointed trustees, hypothetically deemed to have occupied the field from the commencement of the earlier Chapter XI arrangement would do violence both to the manifest intention of Congress and to the enacted language of the positive statutory law. We find no authority for such a tortured construction.

There is a further controversy over whether appellants' services were such as should properly have been rendered by the attorney for the receiver appointed in the Chapter XI proceedings. Were this in fact true, then General Order 44 would logically apply to bar compensation for anyone performing services properly within the scope reserved to the receiver's attorney unless prior court approval had been obtained for the attorney so acting, *cf. In re Progress Lektro Shave Corp.*, 117 F. 2d 602, 604 (2d Cir. 1941); *In re Porto Rican American Tobacco Co.*, 117 F. 2d 599, 602 (2d Cir. 1941). *See also In re National Tool & Mfg. Co.*, 209 F. 2d 256, 257 (3d Cir. 1954). Since this issue was not resolved by the district court below, on remand that court should address itself to this question. In so doing, the district court is of course free to use its considered discretion in assessing the propriety and amount of any allowance awarded, as a consideration de novo of these issues, in conformity with the matters decided on this appeal and hence foreclosed.

Several ancillary points remain for discussion. Appellants pursue their request for allowances, *inter alia*, under §241(4) of the Bankruptcy Act, 11 U.S.C. §641(4), which provides, in pertinent part:

> The judge may allow . . . reasonable compensation for services rendered and reimbursement for proper

costs and expenses incurred in a proceeding under this chapter [X]—

* * *

(4) by the attorney for the debtor . . .

Appellee-trustee argues that "*the* attorney" in the singular precludes allowances for more than one attorney's services. It is true, of course, that duplicative fees may not be awarded several attorneys who perform the work for which only one attorney is needed; *In re Hudson & Manhattan R.R.*, 224 F. Supp. 815, 831 (S. D. N. Y. 1963), *modified*, 339 F. 2d 114 (2d Cir. 1964); 3 Collier, Bankruptcy ¶62.12[8] (14th ed. 1967). But there is no logical reason to preclude the district court from directly compensating several attorneys for the debtor where they each performed distinct services of benefit to the estate. Moreover, §1 of the Bankruptcy Act provides a pertinent canon of construction:

> (35) Words importing the singular number may be applied to mean several persons or things.

11 U.S.C. §1(35).

Appellants may have been retained by the attorney for the debtor, and not by the debtor directly himself. Nonetheless, if the debtor's attorney had authority as an agent to hire assistants; and so long as appellants' services were in the furtherance of debtor's bankruptcy proceedings, benefitted the estate, and were nonduplicative of the work of any other attorney or officer; then we can see no good reason why the chain of their employment, without more would vitiate the propriety of their claim to allowances. *See generally* 3 Collier, Bankruptcy ¶62.10 (14th ed. 1967): "Allowance to Assistants Directly".

Appendix C

As a related final guideline, it would seem here appropriate to emphasize that, if on remand appellants would otherwise be entitled to look directly to the estate for compensation, they should not be precluded from so doing by reason solely of infirmities relating only to the attorney for the debtor, such as insider trading by the latter in the debtor's securities. See the connected appeal of Robert Friedlander, Esq., No. 16789. It would be an altogether different matter, of course, were appellants found to have participated in such infirmities, as does not appear to be the case from the record before us.

Since all parties to this appeal agree that a remand would be necessary to determine the value of appellants' services, and since application for allowances and disbursements was originally made to the district court below, we think a determination by that court of this issue, in the light of our decision here, is properly in order.

The judgment of the district court will be reversed and the cases remanded for proceedings not inconsistent with this opinion.

GIBNEY, *Circuit Judge*, dissenting.

I dissent.

It cannot be too strongly stressed that the appellants here, Leo Neiwirth, Samuel S. Starr, Meyer Weinberg and Edwin Fradkin, were merely employees of the counsel for the debtor of record, Robert Friedlander, in a Chapter XI proceeding, and are here seeking compensation under a Chapter X proceeding. Robert Friedlander, counsel for the debtor, this day was denied all compensation in connection with his services under the Chapter XI proceed-

ing for an impropriety occasioned during his tenure as counsel for the debtor under the Chapter XI proceeding.

At the inception of the proceedings under Chapter XI, Harry A. Margolis, Esq., had been appointed receiver therein and later as special counsel for the attorney for the trustee in the Chapter X proceeding.

As counsel for the debtor, Robert Friedlander, employed the appellants without ever consulting the receiver in the proceedings and, therefore, not with the approval of the court. I would deny compensation on this ground alone as there is no provision in the Bankruptcy Act, for paying more than one fee to counsel for the debtor, though he may distribute it as he likes, to those whom he employs, nor is there any provision in the Act for employment of other counsel by the counsel for the debtor unless he compensates them himself. This is most lucidly pointed up in the opinion of the trial court in denying compensation to the appellants. "General Order 44 is exhaustive, since it covers all three possible situations under which proceedings may take place: receivership, trusteeship, and the debtor left in possession. In the case of receivership, the attorney for the debtor has no independent authority to hire others as retainees of the Court. If they are necessary, he must convince the receiver who then may obtain authorization for their services. Of course the attorney for the debtor may still be entitled to compensation in appropriate circumstances, but his employees are solely his assistants who must share whatever compensation he received or look to other agreements with him." This, of course, must be so inasmuch as while counsel for the debtor need not be approved by the court in a bankruptcy proceeding, he cannot saddle the estate with the additional expenses of one, two or three assistants whom he employs without the approval of the court.

Appendix C

The second basis for my denial of compensation to the attorneys for the attorney to the debtor is that after some five months of futile attempts to reorganize the situation under Chapter XI, all proceedings thereunder were consigned to the limbo of unrequited hopes and the petition was amended to proceed solely under Chapter X. The appellants now seek recompense solely from the fund created by reason of the reorganization in the Chapter X proceeding.

These appellants were not neophytes, nor inexperienced individuals, as brought out in argument, but were mature, experienced counsel wise in the ways of bankruptcy, and they surely must have known that their services under Chapter XI were to be of value to the estate in the Chapter X proceeding. Every propriety pointed to the fact that they should have gone to the court at the commencement of the Chapter X proceedings and at that time secured the approval of the court for some of the services they had performed under Chapter XI were now to be utilized by the trustee in the reorganization under Chapter X and, in its utilization by the trustee they were in effect of counsel then to the trustee and therefore subject to court approval under General Order 44 in Bankruptcy,[1] as to their

[1] General Order 44 in Bankruptcy reads as follows:

APPOINTMENT OF ATTORNEYS

No attorney for receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing

(*Footnote continued on following page*)

integrity, competence and fitness to act on behalf of the estate in the Chapter X proceeding. It is well-settled law that unless counsel have been approved by the court, though their services were of value to the court in a Chapter X proceeding, they must be denied compensation. In *In Re Progress Lektro Share Corp.*, 117 F. 2d 602, the court stated, in denying compensation: "There is no ques-

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(Footnote continued from preceding page)

counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employement would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

tion but that the appellant acted throughout in good faith and a denial to him of compensation is a harsh conclusion. However, the law is unquestionably settled that the order of the district court was correct." *Gochenour* v. *Cleveland Terminals Building Co.*, 142 F. 2d 991, 993; *Albers* v. *Dickinson*, 127 F. 2d 957; *Butcher* v. *Leavenworth State Bank*, 184 F. 2d 498; *In Re Pedeisich*, 103 F. Supp. 199; *In Re Robertson*, 4 F. 2d 238 (3rd Cir.).

That this was requisite, there can be no doubt, since the final sentence of Section 328 of the Bankruptcy Act, 11 U.S.C., states: "Upon the filing of such amended petition, or of such creditors' petition, and the payment of such additional fees as may be required to comply with section 132 of this Act, such amended petition or creditors' petition shall thereafter, *for all purposes of Chapter X of this Act*, be deemed to have been originally filed under this chapter." (Emphasis supplied.). There are no steps necessary "to syllogize" nor is there any tortious reasoning in the relation back doctrine as the language of this section is explicit, plain and unambiguous and these experienced attorneys for the attorney for the debtor, knowing now that the matter was in a Chapter X proceeding, should have sought the approval of the court for the services which were to be utilized as the basis for the plan to be approved under Chapter X.

It is most difficult to understand why the appellants, as attorneys for the debtor, waited until the conclusion of the Chapter X proceedings to ask for compensation from the estate without having ever gained any court approval previously for their appointments by the attorney for the debtor, unless they discovered that they would not be paid by the attorney for the debtor. However, some key to its understanding may be found in the fact that Starr, Wein-

berg and Fradkin presented their bill for services rendered to counsel for the debtor, to him, Robert Friedlander, and, while the record does not disclose they were ever paid, it is reasonable to assume they were not, and, finding that the attorney for the debtor was so inclined, filed their claim against the estate. Again it is not too great an inference to draw that he expected to pay them when he finally filed a bill for $125,000 for his services under Chapter XI, as, from my interpretation of the record, these attorneys for him performed a major portion of the services rendered by him as attorney for the debtor. He also asked $25,000 for his services under Chapter X.

The vice in the majority opinion in condoning the conduct of the appellants in not seeking court approval of their position under Chapter X, is that if these services are to be left, as now suggested, for determination by the lower court as to their value, if any, to the estate under Chapter X, the whole gamut of their conduct from the filing of the petition under Chapter XI until its ultimate discharge under Chapter X is left without the court having any control whatsoever concerning their integrity or competence. If this course of proceeding has the stamp of authority of this court, it may well be that in the future unscrupulous counsel, in the transition to the completion of the estate, might do irreparable harm to it, having no sense of responsibility to the court whatsoever, as they were strangers in the proceedings and had no such status before the court as the attorney for the debtor had, since he was of record in the proceeding.

In my judgment, there broods over the circumstances of this case an aura of irregularity which this court should never lend sanction to.

Appendix C

I would affirm the judgment of the lower court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX D

Judgment of the U. S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16,787 and 16,788

In the Matter of

HYDROCARBON CHEMICALS, INC. and its subsidiaries BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKA HARBOR LAND COMPANY, INC., all New Jersey corporations, Debtors

LEO. NEIWIRTH, ESQUIRE,

Appellant in No. 16,787

SAMUEL S. STARR, ESQUIRE, MEYER WEINBERG, ESQUIRE, and EDWIN FRANKLIN, ESQUIRE,

Appellants in No. 16,788

(D. C. Bankruptcy No. 73-63)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE —— DISTRICT OF NEW JERSEY

Present: HASTIE, *Chief Judge*, GANEY, *Circuit Judge*, and WEINER, *District Judge*.

Appendix D

This cause came on to be heard on the record from the United States District Court for the —— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that that portion of the District Court order of May 16, 1967 identified as paragraph II, which portion denied compensation to Appellants in these cases, be, and the same is hereby reversed and the cases remanded for proceedings not inconsistent with the opinion of this Court. Costs taxed in favor of Appellants and against Appellee, Elliott I. Clemence, Trustee.

ATTEST:

THOMAS F. QUINN
Clerk

June 10, 1968

APPENDIX E

Opinion of the United States District Court, District of New Jersey

COOLAHAN, District Judge:

This matter has a long and tortuous history whose last three years have been unfolded in this Court. The background of this Bankruptcy proceeding is fully set forth in my Opinion of December 11, 1963 requiring that the Chapter XI petition of the debtor be amended into a Chapter X proceeding.

A brief summary of these proceedings will suffice. On the 10th day of July, 1963 Chapter XI proceedings were filed on behalf of the debtor corporation. On or about the 14th day of November, 1963 petitioning stockholders, joined by the Securities and Exchange Commission, sought an order to show cause, which this Court granted, for a hearing pursuant to Section 328 of the Bankruptcy Act, on the petitioners' effort to have the pending proceedings removed from Chapter XI to Chapter X proceedings. After prolonged hearings this motion was granted on December 12, 1963. An appeal to the Third Circuit was later withdrawn and the amended Chapter X petition was approved by this Court on March 17, 1964.

The present Trustee and Robert J. McAlevy were appointed co-trustees. Subsequently Mr. McAlevy resigned to accept an appointment as Judge of the Superior Court of New Jersey.

The parent company, Hydrocarbon Chemicals, Inc., was incorporated in 1949. Its operation was never truly successful. Beginning about 1956 Hydrocarbon diversified into oil and gas properties. In 1960 it formed a subsidiary,

Appendix E

Hyspec Container Corporation, which engaged in the manufacture of polyethylene bottles, and later other corporations were formed which engaged in real estate activities.

According to the testimony of Edward Ehrenkrantz, the company's accountant, it continuously experienced cash deficiencies. In fact he stated the company "was insolvent from the very first day." (Tr. §328, proceeding P. 595). Prior proceedings were commenced in the State Courts, which are referred to later in this memorandum, culminating in the petition of Chapter XI being filed in 1963.

During the 328 hearing before this Court, testimony revealed that a great number of shares of stock in Hydrocarbon were issued to individuals associated with management under questionable conditions. As a result of such hearings and on application of the Trustee, counsel was appointed by this Court *inter alia* to institute litigation against certain institutions and others seeking damages for the above mentioned stock transactions and other alleged items of mismanagement.

The balance sheet of the debtor corporation as of August 31, 1966 showed total assets of $7,569,133.00. This consisted of over $3,000,000.00 in cash, $3,500,000.00 in appraised value of real estate and some $908,000.00 in other assets. The cash balance has at this writing been increased and the value of the real estate somewhat enhanced.

The liabilities in August of 1966 amounted to approximately $8,247,587.00. The deficit the Court believes at this time, has likewise been decreased by reason of the increase in cash balance and increased valuation of the real estate holdings. During the pendency of the Chapter X proceeding some twelve plans were submitted to or filed by the Trustee.

Appendix E

In August, 1966 the plan commonly known as the Whitaker Plan was submitted. Pursuant to the said plan the proponents are to develop the real estate holdings. They are authorized to issue new stock, with five year warrants to puchase the stock at $5.00 per share. 1,500,000 shares of new stock are to be issued on confirmation, including 1,275,000 shares to the proponents or unsecured creditors electing the stock option. The balance will go to the old stockholders on a ratio of 85% to the proponents and creditors and 15% to the old stockholders of Hydrocarbon. Warrants are to be issued to the proponents to purchase 425,000 shares and 450,000 to the old stockholders. Priority administration claims are to be paid in full and the unsecured creditors have the choice of three options. Secured creditors are to be paid within thirty days of consummation.

A portion of these secured creditors, however, have elected to extend their claims. This plan was submitted to the Securities and Exchange Commission for its consideration, and while its report declined to state whether the plan was feasible or not, it did state that it appeared there would be sufficient cash available to satisfy the claimants and to permit the new company to move forward after reorganization. This Court found the plan to be feasible and equitable and approved the same on February 1, 1967, subject only to final confirmation.

The proceedings in this Court have involved the concerted effort of many; the Trustee, his attorney, attorneys representing others with interest in the debtor, the Securities and Exchange Commission and representatives of the proponents of the pending plan of reorganization. These efforts have culminated in a plan of reorganization this Court confirmed, subject to appointment of a board of

directors to be made and the application for fees which are the subject of this memorandum.

All the applicants for compensation have filed substantial memoranda and affidavits in support of their applications. At a hearing on the applications, pursuant to Section 247 of Chapter X of the Bankruptcy Act, many of them indicated for the record the basis of their applications and submitted themselves to examination by a representative of the Securities and Exchange Commission. Subsequently the Commission prepared its advisory memorandum on the applications for compensation and a further hearing was conducted by this Court which consisted substantially of the Commission's representative presenting for the record its memorandum of the application, its analysis of the compensation justification and its recommendations thereon. In addition, further testimony and cross-examination was had on the application of Robert Friedlander, attorney for the debtor.

The Commission has provided the Court with an advisory report analyzing the applications in regard to the adequacy of time records; overlapping of service claimed; necessity of activity by senior partners in certain matters; the complexity of legal problems facing a particular applicant and their beneficial contribution to the reorganization; the overall reasonableness of the requests; and, in some instances, eligibility of applicants for compensation.

The Court has considered these recommendations, but it has given equally full and careful consideration to the petitions themselves and to the disagreement with the

Commission which several applicants have expressed.[1] Additionally, the Court has relied on its own intimate knowledge of the reorganization and of the tasks assigned to and efforts undertaken by the various participants.

Before discussing the individual applications, several general observations are in order. First, those applicants involved in both the aborted arrangement proceeding and the superceding reorganization have presented separate applications for each phase. For the reasons hereinafter explained in connection with the petition of Robert Friedlander, the Court has treated all compensation pursuant to Article XIII of Chapter X of the Act because the success of the Section 328 motion requires the treatment of the entire matter before this Court *as if* the original petition filed on July 10, 1963 was an original Section 128 petition under Chapter X.

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[1] The recommendations of the Securities and Exchange Commission acting in its advisory capacity under Chapter X are generally an invaluable aid to the Judge in making his determination, whether or not he follows any particular recommendation of that agency. While in the present case I have concurred in some instances with the agency's recommendation, and differed in others, it should be noted that I am appreciative of their extremely diligent cooperation and helpful efforts—not only in regard to this extremely difficult task of ascertaining the proper quantum of compensation, but in all aspects of this very troublesome reorganization. While the recommendations of the Commission cannot take the place of my independent judgment they are, of course, entitled to weight as the expert advice of a disinterested agency skilled and experienced in reorganization affairs. See *Matter of Philadelphia and Reading Coal & Iron Co.*, 61 F. Supp. 120 (E. D. Pa., 1945); *In Re North America Light & Power Co.*, 101 F. Supp. 931 (Dist. Del., 1951), *aff'd.* 202 F. 2nd 638 (3rd Cir., 1953).

Appendix E

However, for purposes of analyzing the services performed by the applicants, and only for that purpose, the Court herein adopts the same two-phase analysis followed in most of the petitions and refers to activity during the "Chapter XI" or "arrangement proceeding", on the one hand, and activity during the "Chapter X" or "reorganization proceeding", on the other. Such reference is to be understood merely as a convenient division into the period before and the period after the §328 hearing and the order to amend the petition into Chapter X.

Disposition of each application requires ruling on two separate questions: (1) whether the services are compensable and the expenses reimbursable at all under the applicable law; and (2) what the amount of the allowance, if any, should be. The task is not an easy one, in part because of the Court's increased power and concomitant duty under Chapter X to scrutinize each claim and award only those fees he deems reasonable.

Participation in the proceedings, however rightfully, does not in itself create any absolute right to compensation or reimbursement; nor does the fact that a claimant is a person to whom Chapter X permits compensation, where appropriate, mean that he must be given the requested allowance. Moreover, the absence of objection to a particular claim does not constitute a test of its value nor relieve me of the responsibility of independently examining even unopposed claims. *Matter of Philadelphia and Reading Coal & Iron Co.*, 61 F. Supp. 120 (E. D. Pa., 1945).

Although it is a commonplace, it may not be amiss to remind those applicants who have urged some decisions of other Courts in support of their views, that each pro-

ceeding of this type is *sui generis* in the nature of the beast, the difficulties encountered and the apportionment of tasks among the various participants. Therefore, general rules laid down in other bankruptcy compensation proceedings, whether evincing a frugal or a generous approach, are of limited use and can only provide some guidance. In essence they boil down to one of two admonitions: either the stricture that economy should be the watchword and extravagance curbed, see *In re International Power Security Corp.*, 112 F. Supp. 45 D. N. J., 1953); or the reminder that since Chapter X was designed to encourage more widespread participation in the reorganization proceeding, economy should not be sought so zealously as to preclude fair and reasonable compensation for services rendered, through proper efforts.

Certain factors are widely recognized as valid determinations of a reasonable award: the time and labor required; the novelty and difficulty of questions confronting a particular applicant *in his sphere of endeavors;* the managerial skill required to conduct the debtor's affairs and prepare it for reorganization, on the part of those charged with that responsibility; the professional standing of the counsel and accountants and the customary charges in this area for similar services by the Bar and accounting profession; the total amount in controversy, and the physical magnitude of the assets and operations involved; and finally, the actual benefits contributed by the services of each applicant. See *In re Yuba Consolidated Industries, Inc.*, 260 F. Supp. 930 (D. Cal., 1966); *Matter of General Stores Corp.*, 164 F. Supp. 130 (S. D. N. Y., 1958).

In addition to the aid of testimony or expert advice on these considerations, the Court itself is an expert, by vir-

tue of its experience and knowledge in these matters, concerning reasonable and proper fees in light of all the facts. *Campbell* v. *Green*, 112 F. 2d 143 (5th Cir., 1940).

The most difficult problem is assessing the relative weight to be given sheer number of hours spent, versus actual benefit to the reorganization attributable to those labors. In the case of officers of the Court seeking compensation under Sec. 241 of Article XIII, Chapter X, Courts have generally given more weight to the time element than they do for awards made under Sec. 242 to other representatives of interested parties. The standard is reasonable compensation. *Creditor's Committee of Fox Markets, Inc.* v. *Ely*, 337 F. 2d 461 (9th Cir., 1964); Compensation of others under Sec. 242 or 243 is allowable only where the services for which it is sought have benefited the estate. *In re Solar Mfg. Corp.*, 206 F. 2d. 780 (3rd Cir., 1953); 6A Colliers, §13.02 *passim*.

But even compensation of these statutory officers can be limited insofar as the work performed involved some routine matters and ministerial duties which do not warrant high rates of compensation. *In re Solar Mfg. Corp., supra.*

The following decisions on each applicant have been made in the context of this framework set out above. In addition I have tried, within the limits of reasonable compensation, to stay within the guidelines of the plan in regard to the total allocation for fees and expenses. For the requirement of reasonableness includes the ability of the reorganized debtor to pay. Depletion of its resources may have a direct effect on the fairness and the feasibility of the plan which I have tentatively approved. See *Brown* v. *Gerdes*, 321 U. S. 178 (1943) and *In re Solar Mfg., supra.* I have tried to effectuate the Congressional

policy, implicit in the emphasis of "reasonable" and "proper" compensation throughout the Act, against the historical tendency to allow excessive compensation. *Realty Assoc. Securities Corp., et al.* v. *O'Connor, et al.*, 295 U. S. 295, 299 (1934) ["Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils."] *Callaghan* v. *RFC*, 297 U. S. 633 (1935).

I.

ROBERT FRIEDLANDER, ESQ.

Robert Friedlander has applied for an allowance of $125,000.00 for services during the Chapter XI phase of the proceedings and $25,000.00 under the Chapter X phase as attorney for the debtor corporations. In addition he requests reimbursement for expenses in the amount of $9,131.13. This is part of the claimed expenses of $15,398.00 for which he has already received an assignment in the sum of approximately $6,200.00.

The record indicates that some time prior to July 9, 1963, Mr. Friedlander appeared in the Equity Division of the Monmouth County Superior Court on behalf of a creditor of Hydrocarbon and filed an action against that company for appointment of a receiver.

On the return date of the scheduled hearing, the action was settled between the parties. Thereafter, Friedlander stats he was retained by Paul Belmont sometime during the evening of July 8, 1963 to file a petition under Chapter XI of the Bankruptcy Act on behalf of the debtor corporations. This petition was filed on July 10, 1963, at 9:20 A.M. It totaled some two and one-half pages in length and bore the signatures of Belmont, as President of Hydrocarbon, A. George Kavner, as President of Hy-

spec Container (an affiliate of Hydrocarbon), and Robert Friedlander. *All the signatures* were dated July 9. Also attached to the petition were purported resolutions of the Board of Directors of the various corporations involved in the proceeding, each executed and sworn to by either Belmont or Kavner on July 9, 1963. Also attached were a list of creditors and a balance sheet of Hydrocarbon and its subsidiaries, the latter having been published on or before December 31, 1962. The only other paper filed was an order extending time to the debtors in which to file the statement of their executory contracts, the statement of affairs, and their schedules.

In the §328 application, Friedlander was questioned as a witness by Mr. Robinson of the Securities and Exchange Commission regarding a short transaction in Hydrocarbon stock. He purchased the stock on July 8, allegedly because he had heard rumors that they were in trouble. The testimony on pg. 650 follows.

> "Q. Mr. Friedlander when were you retained to file the Chapter XI? A. The case was filed on Wednesday, July 10. I was retained on, I think, Monday night and worked without sleep through two nights to file the cause, without fee or retainer.
>
> [The Court: "That would be July 8"] . . .
>
> Q. Prior to that time had you any communication with Paul Belmont? A. I had filed adverse equity action on more than one occasion against this corporation for a period of four or five months prior to being retained to file the Chapter XI.
>
> Q. When did you start to prepare the papers which are the Chapter XI petitions? A. Obviously between the time I was retained and the time they were filed.

Appendix E

Q. Prior to the filing of the petition did you engage in any security transactions involving the purchase or sale of Hydrocarbon stock? A. I certainly did. I sold Hydrocarbon short, I made a hundred short sales this year and invariably when I file an equity action I very often file and sell them short.

* * *

Q. At 2:48 P.M., did you sell 2500 shares of Hydrocarbon short, 1300 shares at 3½, 1200 shares at 3⅜? A. I will stipulate that with you. That order was actually put in, I think executed on Monday, I conversed over the weekend with McDonnell & Company, a Vice President, Mr. Clinton Howe, who executed, oh, sometime on Monday morning and shorted 5,000. I wish it was 50,000.

Q. Did you buy 2,500 shares of Hydrocarbon at 3:15 P.M., on July 10, after the petition had been filed?

* * *

Q. Did you buy in 1500 shares through McDonnell & Co. at 1¾ and 1,000 shares at 1½ on July 10 at 3:15 P.M.?. A. On Tuesday night when I had the honor—and I consider it an honor to be retained by this corporate entity—I called my broker forthwith and told him I had a short position of 5,000 shares of this stock and to cover me immediately since I was then their counsel. * * *

Q. At what time on July 10 was the petition filed? A. I do not recall. It is a matter of record. I am sure you have the exact time.

Appendix E

Q. Was it 9:20 A.M.? A. Is that what it indicates?

Q. Well, I show you a copy of the petition. A. Then isn't that much easier—it was filed as indicated on the petition.

Q. At 9:20 A.M.? A. Is that what it says?

Q. Yes, it does. A. Then that is when it was filed."

His petition alleges that from July 8th, 1963, until December 12th, 1963, a period of approximately five months he devoted 2,225 hours in the proceeding, which is approximately 425 hours per month, or approximately fifteen hours per day, each day, for 150 consecutive days, including Saturdays and Sundays and holidays.

Friedlander testified, at the first hearing on these fee applications, that the preparation of these papers occupied him fully from he night he was retained until their filing on July 10—that he worked with Belmont around the clock, without even a chance to change his clothes.

His broker, Mr. Hough, testified at the second hearing that Mr. Friedlander had told him to cover his short position. Friedlander insisted he cover the short although Hough told him the stock would go down further.

Mr. Hough testified that his earlier recollection, given in a sworn statement to the Securities and Exchange Commission in November 1963, had been that Friedlander came to see him about noon on July 10.

On cross-examination by Friedlander, Hough acknowledged that Friedlander sold short many times including stock of companies against whom he had brought equity actions. Friedlander asked Hough whether his present

recollection was such that he would be in a position to deny Friedlander's assertion that he had called him with the cover order the night before and had not been to Hough's office on the 10th because he was in court before Referee Tallyn and working on the arrangement proceeding. Hough said he could not, but reaffirmed on redirect that his earlier recollection which was *some three years closer to the transaction* had been that the order was given him personally by Friedlander on the 10th at noon while the petition was filed at 9:20 A.M. that morning.

Based on my considerable intimacy with these proceedings and my evaluation of the testimony, I find Friedlander's version of the pertinent events incredible. But even assuming he did call his broker the night before, rather than some hours after the filing of the Chapter XI petition, the conflict of interest is apparent. Assume it took Mr. Friedlander as long as he says to file the papers; that he was caught unprepared by the retention as counsel for the debtor; and that he worked constantly throughout the night of the 8th and all of the 9th. The fact remains that he did find time, according to his version, to call his broker on the night of the ninth and that he did so because he realized he "should not be in a short position" in a company for which he was acting. Yet he made no effort to delay the filing until he received confirmation of the purchases covering his short. As it worked out his rather truncated effort to "resolve" the conflict simply limited the wrongful windfall.

Having weighed the testimony and record evidence regarding the circumstances of Friedlander's application, I find that he is not entitled to any compensation whatsoever, both as a matter of statutory proscription and as a

matter of the underlying equity principles obtaining in bankruptcy.

His affidavit in support of his petition states:

> "Under §249 of the Bankruptcy Act, that after the commencement of this proceeding, no beneficial interest, direct or indirect, in any claim against or stock of Hydrocarbon Chemical Co., Inc., et al., the above named debtor corporations, has been acquired or transferred by me for my account."

On the contrary, the cases under Section 249[1] indicate that it precludes an award in this instance. That provision was clearly intended as a drastic prophylactic to end the abuses of insider trading which had long plagued reorganizations. See *Wolf* v. *Weinstein*, 373 U. S. 633 (1962). It must be strictly applied to effect its remedial purpose. *Wolf, supra; Otis & Co.* v. *Insurance Bldg. Corp.*, 110 F. 2d 333 (1st Cir., 1940); *In re Norwalk Tire & Rubber Co.*, 96 F. Supp. 274 (D. Conn., 1951); *Surface Transit, Inc.* v. *Saxe, Bacon & O'Shea*, 266 F. 2d 862 (2nd Cir. 1959).

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[1] Sec. 249 requires applicants to state what claims or stock in which they have a beneficial interest have been acquired or transferred during the proceeding, and then states:

> "No compensation or reimbursements shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims of stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred." See generally 6A Collier on Bankruptcy, ¶13.18.

Its stringent application has worked harshness in cases where the equities in favor of permitting some compensation to the applicant were far more compelling, to say the least, then in this situation, *Wolf, supra* (compensation denied despite 6 years of effort by debtor's officers); *In re Midland United Co.*, 159 F. 2d 340 (3rd Cir., 1947) (trading by members of applicant's family); *Matter of Cosgrove-Meehan Coal Corp.*, 136 F. 2d 3 (3rd Cir., 1943), *cert denied* 320 U. S. 377 (involuntary transfer via sale by applicant's pledgee).

In the leading case under Section 249, the Supreme Court upheld its application even to others than those enumerated in Sections 241-243 of Chapter X. *Wolf, supra.* The Court considered attorneys for the debtor, who *are listed in Section 241*, to be *a fortiori* within Section 249. 372 U. S. at 647 and 652 (dictum). *Accord, Matter of Consolidated Rock Products Co.*, 36 F. Supp. 912 (S. D. Cal., 1941); *Matter of Los Angeles Lumber Products, Ltd.*, 37 F. Supp. 708 (S. D. Cal., 1941). Friedlander's affidavit of compliance with Sec. 249, apparently acknowledges it is applicable to one in his fiduciary status.

The prohibition is a per se rule; I am not at liberty to weigh degrees of disloyalty or conflicting interest. Under §249 excuses of inadvertence, de minimis activity, personal or corporate emergency, and absence of profit—or even loss—from trading are immaterial. "To allow such exceptions and dispensations would frustrate the manifest intent of Congress to impose an effective prophylactic rule." *Wolf, supra,* 372 U. S. at 655; and cases collected in 6A *Collier* ¶13.18, n. 10, 11.

As part of Article XIII of Chapter X, §249 on its face only applies to activities, for which compensation is sought, and to trading, which bars such compensation.

that occur during a Chapter X proceeding. It is not contended that Friedlander made any transfers of Hydrocarbon stock after the §328 hearing caused the amendment of the original Chapter XI proceeding into this Chapter X proceeding.

However, Section 328 of Chapter XI expressly provides that when such a petition is successful and the Court orders an amended petition filed under Chapter X: "Such amended petition or creditors petition shall thereafter, *for all purposes of Chapter X*, of this Act, be deemed to have been originally filed under such chapter . . ." (emphasis added). In other words, the amended petition is treated as a Section 128 "original petition" under Chapter X, in contrast to a Section 127 petition which provides for superceding Chapter X proceedings started while a bankruptcy proceeding under Chapter I to VII is pending. See *Grubbs* v. *Pettit*, 282 F. 2d 557 (2nd Cir., 1957).

This "relation back" effected by Section 328 means that when the Court reviews fee applications for services rendered before the §328 motion, such fees can only be awarded pursuant to Article XIII of Chapter X, for there is before the Court, as a matter of law, only one proceeding, deemed *ab inito* to be under Chapter X. Accordingly, §249 applies to services rendered and any trading performed after the first petition was filed on July 10, 1963.[2]

[2] This effect is also indicated by the fact that Section 244 of Article XIII, Chapter X, expressly provides for the manner of compensation for services rendered during a pending bankruptcy proceeding which is superseded by a Section 127 petition for Chapter X. No such provision is made for fee determination in regard to services performed during an aborted Chapter XI proceeding and this appears to be precisely because the latter case is treated as an original Section 128 Chapter X proceeding. See discussion of petition of Margolis, *infra*.

Nor can the application be defended on the ground that when the short sale was covered, the matter was still under Chapter XI and the petition had no notice that it would be converted into a Chapter X proceeding by a §328 motion. In the first place, the trade was so clearly in conflict with his fiduciary position as attorney for the debtor, that even apart from Section 249, he was subject to the equity maxims on which it was based. And those strictures discussed below, equally apply in Chapter XI proceedings. Second, when the §328 motion was successful and Section 249 thereby made applicable, Friedlander could then at least have applied for the Court's approval of the antecedent sales of the debtor's stock. Cf. *Matter of Cosgrove-Meehan Coal Corp., supra,* 136 F. 2d at 6.

Although Section 249 bars any award, even if it did not Mr. Friedlander would be denied compensation under long standing rules regarding a fiduciary's duty of undivided loyalty incumbent upon an attorney for the debtor in equity proceedings. "Thus, even where the prohibitions of Section 249 are for one reason or another not applicable to a particular insider transaction during reorganization, bankruptcy courts have consistently recognized the existence of inherent equity power to disallow or at least to reduce claims for compensation or reimbursement." *Wolf, supra,* 372 U. S. at 648, n. 13 (and cases cited); *accord Matter of Midland United Co., supra.*

To be sure, reliance on these equity maxims, unlike the statutory bar of §249, requires a showing of unfair enrichment and impropriety before compensation can be denied for services performed. However, on the basis of the above record and my evaluation of the credibility of the testimony adduced before me in this proceeding, I am satisfied that the application is presented with unclean

hands; compensation for one who took advantage of his insider position in the manner of petitioner would be repugnant to the judicial conscience.

Finally, we come to a subsidiary matter, not presented by Friedlander's petition, but over which this Court clearly has jurisdiction.

Where compensation sought in a terminal application under Chapter X is barred by Section 249, the question may also arise whether the applicant is entitled to retain any compensation previously received for service performed as attorney for the debtor. In *Wolf* such recoupment was mandated *even though the applicants' past salaries for their services to the debtor had been paid under court approval.* "To hold that one who trades in violation of §249 forfeits only his right to *future* compensation would place a premium on concealment of transactions in the Debtor's stock and thereby jeopardize the salutory policies of the Statute." 372 U. S. at 654.

In this case, Friedlander has requested reimbursement for out-of-pocket expenses in the amount of $9,131.13. According to his petition, this represents total expenses of some $15,398.00 of which he received an assignment of claim from the Debtor for the amount of approximately $6,200.00, which he has deducted to arrive at the present $9,131.13 claim.

The Court having found Friedlander's trading within the purview of Section 249, there is "no alternative but to order the restitution of all amounts of compensation and reimbursement received . . . since the start of the reorganization." *Wolf, supra,* 372 U. S. at 654. Both *Wolf,* and *Midland United* teach that reimbursement for expenses comes under Section 240 as much as fees. There-

fore, petitioner Friedlander shall be required to return to the corporation the amount of $6,267.00 already received as reimbursement.

II.

LEO NEIWIRTH and STARR, WEINBERG & FRADKIN.

The applications of Leo Neiwirth, Esq., and of Starr, Weinberg & Fradkin, Esqs., can be treated together since the same analysis governs each. Their respective applications state that Neiwirth and the firm were both retained by Robert S. Friedlander, Esq., to assist him in his capacity as attorney for the debtors. Neiwirth seeks $15,000.00, Starr, Weinberg & Fradkin seek $5,000.00.

There is no representation that the retention of either the firm or Mr. Neiwirth was sanctioned by order of the court pursuant to General Bankruptcy Order 44. In fact, Starr, Weinberg & Fradkin originally sent their bill for services to Mr. Friedlander himself. The Court believes this was the correct procedure, since neither that firm nor Neiwirth are entitled to any compensation from this Court on account of their failure to comply with the requirement of General Order 44.

Neiwirth claimed a total of 750 hours work in determining validity and priority of various claims. Starr, Weinberg & Fradkin also worked on the claims and allege to have removed a jeopardy assessment filed against the estate by the United States. While I have some reservations about the extent and value of these services, it is unnecessary to evaluate them. It is true, as petitioner Neiwirth claims, that the attorney for the debtor may hire whatever assistants he desires; the point is that unless the court approves this added burden, the assistants

must look to him not only for their employment but for their fee. General Order 44 is exhaustive, since it covers all three possible situations under which proceedings may take place: receivership, trusteeship, and the debtor left in possession. In the case of receivership, the attorney for the debtor has no independent authority to hire others as retainees of the Court. If they are necessary, he must convince the receiver who then may obtain authorization for their services. Of course, the attorney for the debtor may still be entitled to compensation in appropriate circumstances, but his employees are solely his assistants who must share whatever compensation he received or look to other agreements with him.

III.

EDWARD E. EHRENKRANTZ AND COMPANY.

Edward Ehrenkrantz and Company were the accountants for the debtor in the Chapter XI proceedings. They state in their petition that 147 days were spent performing these services, of which 134 were charged at partner rates of $100.00 per day, and 13 days at senior rates of $75.00 per day. Petitioner seeks $14,375.00 compensation for these services.

At the outset it is significant that the rates charged by petitioner were not set by the Referee nor are they established by statute or local rule, as were those of the Receiver's accountant.

The record indicates, and the Security and Exchange Commission agrees, that petitioner's authorization to perform those duties for which he now seeks compensation was orally received from the Referee. The need for such accounting assistance is recognized by all involved in this proceeding.

Appendix E

The primary function performed by Ehrenkrantz was the preparation of asset and liability schedules for the estate used for the filing of the Chapter XI proceeding. They performed these functions satisfactorily. The petitioner was of some assistance to Pogash and Company in their efforts to reconstruct some of the financial transactions of the debtor during the Chapter X.

The rates employed by petitioner in setting their request for compensation were clearly excessive, particularly in light of the statutory rates applied to Pogash and Company. Therefore, I am of the opinion that $5,000.00 would adequately compensate petitioner and reflect their contribution to the estate.

IV.

WERKMAN, SAFFRON & COHEN, Esqs.

This firm performed a specific limited task, namely, the preparation of the Chapter X filing for the South Jersey Land Corporation, one of the subsidiary debtors. For this preparation which they claim took 50 hours, they seek compensation of $2,500.00.

It is undisputed that the task was adequately performed by the applicant. However, during the proceedings prior to the Section 328 motion, much of the groundwork concerning the situation of South Jersey had been investigated and detailed by others. Some of the filing preparation was more ministerial than legal, and the rest was greatly facilitated by the prior presentation of argument on the 328 motion. Accordingly, I think a fee of $1,500.00 is a more accurate reflection of the beneficial services rendered by the firm and compensation will be so awarded.

Appendix E

V.

LUCIEN C. WHITAKER, II.

Mr. Whitaker seeks compensation of some $60,000. allowance and $15,000.00 in expenses, essentially on the grounds that he was the matchmaker who brought together the proponents of the plan which has been accepted and the trustee and counsel to the trustee.

There is no doubt that the acceptance of a plan was beneficial; indeed, it was the goal of the reorganization. But the Court must distinguish between services actually rendered on behalf of the attempted reorganization and services which are strictly in the interest of and on behalf of an individual or individuals. *Pennish* v. *A. Herz, Inc.*, 81 F. 2d 511 (7th Cir., 1936).

Whitaker was formally retained by Henry Mellon, the main plan proponent. He sent this Court correspondence as "agent for the proponents." Under his arrangement with Mr. Mellon he received a small retainer and is to receive a fee of $50,000.00 upon consummation of the plan. In addition he will be a financial consultant to the reorganized company; have the right of first refusal in regard to obtaining new financing in the first year; and receive a 3 per cent commission on the dollar amount of such financing as he obtains. The estimated need of the company for $2,000,000.00 of financing raises the prospect of a further $60,000.00 commission opportunity. Whitaker will also be a director.

Whitaker's incentives to effectuate the plan are obvious; any benefit to the reorganization is incidental; and he must look to his client for his compensation and for his expenses.

Appendix E

VI.

MILTON, KEANE & DEBONA.

This firm also stands in the position of a volunteer vis-a-vis the reorganization inasmuch as they too were specifically retained by the plan proponents. They must look to their client for compensation and are ineligible for an allowance under the Bankruptcy Act. Their assistance to Whitaker in the formation of the plan was not authorized by the Court as an adjunct of the trustee's efforts to achieve a reorganization, and, therefore, the mere acceptance of their plan is insufficient.

VII.

KLEINBERG, MORONEY & MASTERSON.

The law firm of Kleinberg, Moroney & Masterson was appointed Co-counsel to the Receiver by order of Referee Tallyn on July 19, 1963. Petitioner claims approximately 833 hours in proceedings under Chapter XI and seeks compensation of $60,000.00.

As Co-counsel to the Receiver the firm performed all the basic legal services required under a Chapter XI proceeding. These included numerous appearances before the Referee in Bankruptcy which concerned the reduction of claims, reclamation of equipment of the debtor as well as foreclosure proceedings and miscellaneous matters. Petitioner was also engaged in conferences surrounding Hyspec Container Corporation. Finally, the firm appeared in the 328 proceeding.

Of the 833 hours claimed, petitioner is able to account for only 134 hours by way of contemporaneous time sheets, and all of these are hours actually spent in Court.

The remaining time was estimated by petitioner under such headings as "Miscellaneous Conferences", "Conferences Relative to the Debtors", Interoffice Activities and Joint Services," and the like. Upon further examination of their records and from a personal familiarity with the actual extent of their participation in this matter, it is apparent that much of the time spent outside of Court was either largely ministerial or overlapped certain functions performed by other claimants now before the Court. I feel compelled to mention here, as elsewhere, the lack of adequate time records has hampered the Court in ascertaining the contribution of petitioner's efforts.

With these considerations in mind it is the opinion of the Court that petitioner should be compensated in the amount of $15,000.00.

VIII.

WILLIAM H. WHITNEY,

Secretary to the Creditors Committee.

Mr. Whitney was elected Secretary of the Creditors Committee at their meeting on July 22, 1963. The prime function of the Secretary was to notify all unsecured creditors of the pending Plan of Arrangement. He was responsible for the preparation and distribution of the necessary forms and other communications between the creditors and the Creditor's Committee. He is eligible for compensation under Sec. 243 of Article XIII, Chapter X.

Petitioner is seeking compensation for his services in the amount of $2,600.00 for services performed in both Chapter XI and Chapter X proceedings. It appears that the work catalogued by petitioner was satisfactorily performed. However, in light of his limited contribution, a fee of $1,500.00 would represent adequate compensation for all services.

Appendix E

IX.

POGASH AND COMPANY

Pogash and Company served both as accountant to the receiver in the proceeding under Chapter XI and as accountant to the trustee in the superseding Chapter X reorganization. The applicant's services were critical in establishing the need for the supervision of Chapter X rather than arrangement under Chapter XI and instrumental in facilitating the reorganization under Chapter X.

The task facing the accountants for the receiver in this matter was almost tantamount to re-creating by induction books which would accurately reflect the operations of a nation-wide substantial corporate enterprise. No one familiar with the labyrinthine schemes of the prior management would characterize the required audit as an ordinary matter of accounting.

The Security and Exchange Commission has indicated its satisfaction with the time records offered in support of the application, with the regularity of the rates used, and with the nature and benefits of the services rendered. On the basis of 255 days, of which 200 were rated as senior man days and 55 as junior man days, Pogash seeks final compensation of $40,448.00 for services performed in both Chapter XI and Chapter X proceedings. This is in addition to the prior interim allowance of $83,239.00 which this Court granted.

The record of this applicant's service is fully set forth in the petition filed with the Court.

While the Court is only too well aware of the protracted and farflung nature of the investigation, audit and

analysis required, those characteristics cut two ways. Of the total time recorded, significant amounts were spent not in accounting analysis or auditing per se, but in collecting documents, holding strategy conferences with the attorneys, travel, phone conversations and the like. All were compensable endeavors but in light of the spirit of economy which I have applied to all these applications, such activity should not be compensated at the full rate for accounting work which is the basis for the total application. I have discounted the overall claim accordingly and the petitioner will be allowed final compensation of $35,000.00.

X.

ELLIOT CLEMENCE

Mr. Clemence and Robert J. McAlevy, now Judge, were appointed co-trustees in the reorganization. Since August 28, 1964 Mr. Clemence has served as sole trustee. During the period from his appointment to date he has demonstrated the highest concern for the estate in his trust and spent considerable effort, of which I am aware, on its behalf. He has devoted practically all his time since his appointment to the affairs of the company and performed his duties to the full satisfaction of the Court.

In general his petition refers to his efforts in search of and in evaluation of possible plans; his participation in negotiations with prospective purchasers and with claimants; conservation of the assets; and management of certain operating units of the debtor.

He was required to gain first hand knowledge of the debtor's operations and this necessitated inspection of gas fields in West Virginia and the oil fields in Texas. He also consulted with Texas banking officers and oil op-

erators in an extremely thorough effort to gain information (in addition to his own experience in the oil well industry) concerning the feasibility of continuing certain operations; the alternative sale prospects; and the fair value of the wells. I am of the opinion that his recommendations on the sale of these Texas properties directly helped the estate gain the top dollar valuation.

The Securities and Exchange Commission recognizes the difficulties attendant upon managing estates of this size and complexity. It generally found Clemence's efforts substantial and effective. However its view is that much of the negotiation and planning in which the trustee participated was primarily of a legal nature and required counsel for the trustee to carry the greater portion of the load.

To the extent that the purchases of Hydrocarbon assets, examination of claims, plans, or executory contracts and the like involved legal problems this is true. Nevertheless it was Mr. Clemence who had the ultimate statutory responsibility and who was required to exercise his independent judgment on many of these matters. In thus acting on advice of counsel he still exercised managerial discretion on countless matters of the kind equal to the executive officer of a substantial company. Therefore, his intimate familiarity with and participation in such activity was essential and his effort was not supererogatory.

It is also true that the debtor's ongoing business operations were largely confined to activities at the West Virginia gas properties since the Texas properties and Hyspec were either sold or shut down after Mr. Clemence entered the scene. However, he actively participated in these decisions as noted, and in the present matter even the conservation and management of the "dormant" New

Jersey properties involved constant legal and business problems—which to this Court, trying to sit on its regular calendars, hardly seemed dormant.

For his services in this reorganization Mr. Clemence is fully entitled to additional compensation of $115,000,000.

XI.

JOSEPH H. STAMLER

Judge Stamler seeks compensation both as attorney for the petitioning stockholders in the 328 motion and as Co-counsel with William Wachenfeld as Counsel to the Hydrocarbon Stockholders' Protective Committee. The present consideration is limited to Judge Stamler's participation as attorney for the petitioning stockholders.

He was contacted by stockholders who had become aware that a Chapter XI proceeding had been filed by the corporation. As a result of his investigations and after conferring with the stockholders, he filed a petition before this Court under Section 328 of the Bankruptcy Act to terminate the Chapter XI proceedings, and place Hydrocarbon under Chapter X.

The trial of this matter consumed a considerable period of time between November 19th and December 2nd, 1963. Petitioner's motion met with vigorous opposition from both the counsel for the debtor and from the Unsecured Creditors Committee, as well as from an opposing group of stockholders. Petitioner's position prevailed at trial and an order was granted by this Court. This action was immediately appealed to the Third Circuit Court of Appeals by the Unsecured Creditors Committee. Petitioner briefed his grounds for defense on appeal and fully prepared the case for the petitioning stockholders. On the

day appointed for oral argument the appellants applied for a dismissal which was granted.

In short, petitioner was the moving force for the 328 petition, personally directing that action from initial investigation through the appellate process. As a result of that hearing, it became clear to the Court—and in light of subsequent revelations is even more apparent now—that the imminent confirmation of the proposed plan under Chapter XI would have been a disaster for the debtor, its creditors and its non-insider stockholders.

Judge Stamler seeks $30,000.00 compensation for 430 hours devoted to his activities as attorney for the petitioning stockholders. The complexity surrounding the issues presented during trial of the §328 motion are readily apparent to me having heard the motion and written the opinion; petitioner's performance in this regard was marked by efforts of the highest quality.

However, as the Security and Exchange Commission noted in their report, some of petitioner's time records were lost while being transferred from Judge Stamler's office upon his appointment to the bench. In addition, it appears that petitioner's efforts on other aspects of the litigation were somewhat duplicated by other members of his firm or by counsel for the receiver. Therefore, adequate compensation for petitioner's activities as attorney for the Petitioning Creditors would be $15,000.00, plus disbursements of $1,391.50.

[This application does not encompass additional fees which will be granted upon the resolution of pending litigation against the Bank of Commerce, et al., petitioner here will be entitled to a portion of those fees for his participation prior to his elevation to the bench.]

Appendix E

XII.

STAMLER and WACHENFELD

Joseph H. Stamler and William Wachenfeld seek joint compensation for their efforts as Co-counsel to the Stockholders Protective Committee under the Chapter X proceedings. They state in their petition that Stamler spent 375 hours and Wachenfeld 1200 hours in this capacity for which they seek $75,000.00 in compensation.

Although the Securities and Exchange Commission has recommended a specific apportionment between them, the Court is of the opinion that one amount should be granted to both parties for distribution as they see fit.

Their activities in the Chapter X phase included substantial participation in the negotiation with plan proponents, evaluation of plans presented, negotiation of the stock allocation under the plan selected, assisting in the sale of Hyspec, and settlement of the claims arising from the "Jaffe Transactions."

Petitioner Stamler's service in this phase was not as extensive as in the Chapter XI proceeding, in part because he began to concentrate on the Bank of Commerce litigation referred to above. He did participate in many conferences regarding the above matters, met with the stockholders and appeared on several court matters. The Security and Exchange Commission claims that these activities were not extra-ordinarily helpful to the debtor. While this is true, I am not in agreement with the Commission's doubt about the value of participation in such conferences and court hearings by an attorney of Judge Stamler's ability, even though he was not the principal advocate of specific positions, but merely lent counsel in the discussions.

Appendix E

The larger part of the petitioners' services were carried out by petitioner Wachenfeld and the firm of Lum, Biunno & Tompkins with which he is associated. They were central participants in the negotiation over the Daigle, or Simon, plan which resulted in the proposal for a 35 cents cash option to the creditors—a proposal which has been retained in all subsequent plans. On the other hand, the Court notes that the 35 cent figure was largely the effort of other applicants and cannot be attributed directly to the instant petitioners.

Moreover, since the Daigle plan was withdrawn by the proponent it cannot be considered one which was rejected by the Court or the interested parties on the basis of petitioners' work, though the benefit of their screening effort must be acknowledged.

Their efforts were decidedly beneficial in regard to the extremely complex Jaffe transactions which they helped unravel and which they were responsible for settling at substantial saving to the estate. They also took an active role in soliciting and investigating purchasers for the Hyspec corporation and were helpful to the trustee and the attorney to the trustee in the ultimate sale.

Finally, their able and lengthy analysis of the stockholder's position in regard to the plan adopted has resulted in an allocation of 15% of the stock in the reorganized company to the shareholders of the debtor corporation.

Counter-balancing these contributions is the fact that a large proportion of the hours involved represent services by a junior member at Lum, Biunno & Tompkins. While the Court in no way questions his very able and diligent performance on intricate matters and realizes

that he was working under the supervision of petitioner Wachenfeld and others, the award for these services should be discounted accordingly from figures based on senior rates. Accordingly, compensation is awarded to petitioners Stamler and Wachenfeld for the Chapter X phase in the amount of $30,000.00.

XIII.

HARRY A. MARGOLIS

Petitioner Margolis served as the receiver during the Chapter XI proceeding and as special counsel to the trustee in the Chapter X reorganization.

In regard to the latter, he seeks compensation of $12,600.00 for a claim of 516 hours of work which consisted of reviewing files, proceeding in matters before the trustee, handling minor litigation, and generally assisting the trustee in the more routine aspects of larger litigation. Margolis rendered generally satisfactory services whenever he was called on for assistance to the trustee and trustee's counsel in this phase of the proceeding. He is entitled to substantially the amount requested.

The claim for the earlier phase of this proceeding when he served as receiver of the debtor corporations is more problematical. Margolis seeks compensation of $134,032.50 for this receivership exclusive of disbursements, based on a claim of 1,500 hours work.

The receivership lasted for approximately ten months, but I note that following the Court restraint issued in conjunction with the order to show cause on the Section 328 motion, the activity in the estate prior to the appointment of a trustee was of a more limited nature. His prime concern was the preservation of the debtor's assets; a

great portion of the time was spent overseeing the operations of Hyspec which were alternately closed down, reopened with additional financing, and then closed down again.

In addition, Margolis reviewed the pleadings in all of the litigation filed against Hydrocarbon including many foreclosure and reclamation actions, participated in numerous conferences with the attorney for the receiver, the Court, and other interested parties and arranged for interim payments under Court approval necessary to continue certain operations.

While these efforts were helpful and diligently performed, it must be emphasized that a great number of them involved the more routine aspects of litigation and investigation of Hydrocarbon's minor difficulties. The primary activity at this time, that is negotiation regarding the Texas property, and the overall investigation of Hydrocarbon's entanglements were not handled by the receiver.

Margolis participated in the §328 hearing but his role was neither extensive nor pivotal in the Court's decision.

A number of the entries in his petition involve matters which he reviewed and then referred to counsel for the receiver for further action. Many hours listed relate to phone calls, conferences, travel and processing payments to and from the debtor which were of a rather trivial or ministerial nature requiring little legal effort. As an officer of the Court, Margolis is entitled to compensation for these required duties, but not at the same rates as obtain for more substantial legal services.

Finally, I question petitioner's claim to compensation under Section 48a of the Act as incorporated by refer-

ence into Chapter X proceedings under Section 244, Article XIII of Chapter X.

Section 244 provides for compensating prior services of, inter alia, receivers in "prior pending bankruptcy proceedings", which the Chapter X petition has superseded.

In the first place, as noted earlier, the effect of the successful §328 motion was to convert this matter into a Chapter X proceeding treated as an original Chapter X from the date of the first petition in this Court. Reference to "prior pending bankruptcy proceedings" in Sec. 244 and Sec. 245 of Chapter X is a technical term of art which includes *only* ordinary bankruptcy proceedings under Chapters I through VII of the Act and not arrangements under Chapter XI. Cf. *Grubbs* v. *Pettit*, 282 F. 2nd 557 (2nd Cir., 1960). The precise issue in *Grubbs* was proper venue for a Chapter X petition superseding a Chapter XI proceeding already begun, but the Court's exhaustive analysis of the usage of the term "prior pending bankruptcy proceeding" is also dispositive here. Therefore, I am of the view that Sec. 244 does not apply to Margolis' services rendered in the Chapter XI phase of the proceedings and he is properly compensable under Sec. 241, by virtue of the Sec. 328 motion and subsequent filing of the Chapter X petition.

However, assuming *arguendo* that Sec. 244 is applicable, the Court is not compelled to award Margolis the amount he has claimed on the basis of the Commission rates set forth in Sec. 48. Section 244 itself is not mandatory, and simply permits the Court to grant compensation under Sec. 48. *Campbell* v. *Green*, 112 F. 2d 143 (5th Cir., 1940); see *Dickenson* v. *Cowan*, 309 U. S. 382, 389 (1939). Second, even if we turn to Sec. 48, that too

provides the Court with discretion to judge the appropriate compensation not to exceed the amounts arrived at by application of the percentages listed therein. See Sec. 244, Sec. 48(g), Sec. 48(a).

In other words, the Court is twice directed to exercise its discretion and the combined effect of Sections 244, 48(g) [to which Sec. 244 refers in cases of reorganization culminating in a plan], and 48(a) is merely to offer a maximum guideline which the Court cannot exceed and may not choose to reach.

In light of all these factors, compensation to Margolis will be the total of $35,000.00 apportioned as $8,000.00 for his services in the Chapter X phase, and $27,000.00 for his service as receiver in Chapter XI.

XIV.

The law firm of Furst, Furst & Feldman, herein represented by Mr. David Feldman, and A. Robert Rothbard, Esq., file a joint application as attorneys for the unsecured creditors. They were first selected as co-counsel to the unofficial creditors committee in the Chapter XI phase, and subsequently they were recognized as counsel for the creditors committee in the Chapter X proceeding.

Their activity included the general run of efforts to protect the creditors' position such as filing proofs of claim, examining records, petitions and other files for the receiver, and joining the receiver in opposing the inclusion of the Texas properties in the reorganization.

A significant part of their efforts under Chapter X involved critical examination of plan proposals; opposition to some, support of others, and protection of the credi-

tors' position in the options provided under the final selection. They were notably instrumental in the evolution of a 35 cent cash option for creditors now included in the final plan, which evolved from negotiations under the Daigle plan although not initially included therein. See the discussion of the petition of Stamler and Wachenfeld, *supra*. All of these efforts were of benefit to the estate and are compensable despite the fact that not all of them directly led to the consummation of the successful plan. The policy of encouraging widespread participation under Chapter X extends to Section 242 and allows recognition for "constructive ideas in opposition to the plan which are as valuable to the estate as ideas in support of a plan." See 6a *Collier* 13.06, n. 30 (SEC Commissioner, now Justice Douglas, testifying on the Chandler Act).

Petitioners' activities during the Chapter XI phase present a different picture since a very substantial portion of time was spent opposing the Section 328 motion and preparing the aborted appeal of its success. This was in conjunction with the firm's strenuous effort in support of the attorney for the debtor's attempt to have the plan arrangement under Chapter X approved. These efforts are not on the same footing with the later opposition to reorganization plans; they did not contribute anything to the estate and at most hindered the eventual exposure by others of the dangers of leaving the debtor under its original management. Intent is not the issue; they were taking a strong creditor position. The point is simply that opposition to the 328 motion was hardly a contribution to the proceedings under which they must now seek compensation.

Appendix E

The application also presents a discrepancy concerning time records. They claim joint services in the amount of 1200 hours for which they seek compensation of $75,000.-00. At the hearing on compensation, Mr. Rothbard estimated that they had actually spent closer to 1400 hours and that of these he had accounted for about 40 to 45%. However, Rothbard admitted keeping no time records except for personal diary entries of court appearances and other appointments. When it was noted that not one single entry in the petition's statement of services referred directly to activity by petitioner Rothbard, Mr. Feldman advised the Court that none of the entries related to Rothbard's personal undertakings *per se*. I have taken this into account, in addition to my opinion, based on familiarity with these proceedings, that petitioner Rothbard's role was much less than Feldman's and, in regard to the Chapter X proceedings, was rather limited. I mention these circumstances of varied participation by the claimants both because the Securities and Exchange Commission relies heavily upon them and because they again highlight the need for adequate time records in this area. However, as in the case of Stamler and Wachenfeld, I am of the opinion that the compensation awarded by the Court may be allocated as petitioners see fit.

Finally, I am mindful of the fact that in many instances Feldman served merely as a communications link between the receiver, and later the trustee and their attorneys, on the one hand, and the secretary of the creditors committee and the committee, on the other. Such communication was a necessary adjunct of the proceedings to keep the creditors informed of the proposals, contested claims, etc., but it did not involve particularly complex legal analysis. Much of the examination of

pleadings, documents and other papers was likewise rather routine, and a great many of Mr. Feldman's conferences and communications seem to have been disproportionately long and duplicative in relation to their contribution.

A total fee of $30,000.00 to the joint applicants represents a reasonable compensation for their contribution to the proceedings.

XV.

CRUMMY, GIBBONS & O'NEILL

The law firm of Crummy, Gibbons & O'Neill seeks compensation of $25,000.00 for 600 hours of services as co-counsel to the receiver in the Chapter XI phase of the proceedings. It also seeks final compensation of $150,000.00 for services as counsel to the trustee in the Chapter X phase, based on a total claim for $175,000.00 for some 3,000 hours minus an interim allowance of $25,000.00 already granted by this Court.

The firm's activities and major contributions to both the Chapter XI and Chapter X proceedings are too numerous to list here. In summary, it suffices to note this Court's opinion that petitioners' efforts were invaluable and essential to this reorganization.

The bulk of their effort during the Chapter XI phase was directed toward the investigation of the debtor's entanglements in fraudulent agreements, disguised wastes of corporate assets, improper compensation, and a host of other improprieties whose cumulative proportions are still staggering to contemplate even after four years of exposure.

Appendix E

Crummy, Gibbons & O'Neill, with the aid of a few others, notably the Pogash accounting firm, bore the brunt of the analysis and investigation of these irregularities and laid the foundation thereby for the successful 328 motion. The Securities and Exchange Commission apparently feels that the firm's participation in that hearing was not too active or important. On the contrary, the firm's efforts in conjunction with Pogash was extremely helpful to Mr. Stamler, who as attorney for the movants stockholders carried the actual litigating load. Their help in delineating the company's ills was instrumental in convincing the Court that Chapter X supervision was necessary.

Similarly, the Commission downplayed the firm's contribution in negotiations for the sale of the Texas oil properties. This skepticism is premised on the fact that the eventual sale was to purchaser first contacted by the attorney for debtor. In fact a tentative contract had emerged from those prior negotiations and the attorney for the debtor's petition, denied above for other reasons, asserts that he was responsible for the sale because the final terms were basically what he had negotiated at the very start.

This analysis fails to give adequate consideration to the flaws in the original sale plans, which were based on misassumptions, inflated valuations, the fact that the assets received for the property would have been subject to other interests, and were based on highly dubious estimates of the value of certain stock to be received in part payment.

These pitfalls are fully discussed in the Court's opinion granting the §328 motion, cited above. The important point is simply that a great deal of further exploration

of alternative dispositions of the Texas properties were still required, as well as more negotiations with the ultimate purchaser. Much of this was done by the firm as co-counsel for denied above for other reasons, asserts that he was responsible for the sale because the final terms were basically what he had negotiated at the very start.

This analysis fails to give adequate consideration to the flaws in the original sale plans, which were based on misassumptions, inflated valuations, the fact that the assets received for the property would have been subject to other interests, and were based on highly dubious estimates of the value of certain stock to be received in part payment.

These pitfalls are fully discussed in the Court's opinion granting the §328 motion, cited above. The important point is simply that a great deal of further exploration of alternative dispositions of the Texas properties were still required, as well as more negotiations with the ultimate purchaser. Much of this was done by the firm as co-counsel for the receiver in Chapter XI, and the efforts were continued as counsel for and in cooperation with the trustee under Chapter X. The Court was constantly advised of the course of these negotiations and is satisfied that the firm's extensive activity in Texas in this connection was not duplicative of Mr. Friedlander's supposed accomplishments, and was highly beneficial to the estate.

The Commission does concede that the firm was quite successful in several substantial endeavors to preserve or increase the estate.

Largely through the petitioner's services, it was determined that the sizeable capital gains tax attendant on the

sale of the Texas property could be offset by a propitious sale of the Hyspec corporation. The necessary legal work was rapidly affected, and a tax saving of almost a million dollars achieved.

Second, the firm was able to obtain a reconveyance to the debtor of the South Jersey Land Corp. property which had been alienated without any adequate consideration. The property is critically valuable in connection with the development of the Berkley Shores and South Jersey properties of the debtor.

The firm also was able to avoid the transaction wherein the debtor had lost the valuable Lakewood property via a fraudulent scheme.

These are only the highlights of the petitioner's efforts; similarly beneficial results were achieved in a great many other matters, some of which involved intricate legal questions and negotiations.

While the Commission views much of the firm's services for the receiver and the trustee as perfunctory inventory taking, record checking and paper filing, the intricate nature of the search and investigations involved and the sizable benefits directly attributable to those efforts which the estate has enjoyed are clear. The reorganization could not have come close to fruition without their contribution.

On the other hand, particularly in the last half of the Chapter X proceeding, there is a significant portion of the applicant's entries which relate to formal duties of the attorney for the trustee in regard to presentation of plans, court hearings on confirmation, and on fee applications which are of a more routine nature and do not merit

compensation at the same rate as their earlier efforts. The same discounting consideration applies to periodic conferences with other participants necessary to "hold the plan together" through the fee hearing and final confirmation, a task which the attorney for the trustee has shared with several others.

Finally, I agree with the Commission that in some of these instances, work could have been performed by associates rather than a senior partner in the firm.

On the whole, however, I am of the firm opinion that the counsel for the trustee and co-counsel for the receiver deserves a substantial portion of the requested fee and find that a total of $135,000.00 is reasonable compensation, allocated as $15,000.00 for their services in the Chapter XI phase and $120,000.00 for their services in Chapter X.

DISBURSEMENTS.

The following requests for disbursements by petitioners are granted:

CHAPTER X

Crummy, Gibbons & O'Neill	$ 1,453.97
Edward Ehrenkrantz	402.00
Furst, Furst & Feldman [Feldman]	799.25
[Rothbard]	490.58
Wachenfeld and Stamler	2,947.82
William Whitney	461.00
Sub-total	$ 6,554.62

Appendix E

CHAPTER XI

Crummy, Gibbons & O'Neill	$ 2,530.97
Kleinberg, Moroney & Masterson	251.50
Harry A. Margolis	814.85
William Whitney	812.00
Sub-total	$ 4,409.32
Total	$10,963.94

Those disbursements not listed herein are denied with the exception of those of Judge Stamler's which were included in his request for total compensation. See p. 30, *supra.*

Judicial assessment of allowances in reorganization has been recognized as a delicate, difficult and thankless task. *Ruskin* v. *Griffiths,* 269 F. 2d 827, 833 (2nd Cir., 1959). It was complicated here by the dismaying number of discrepancies among the applications or between them and the Record. I have tried to do justice to all the applicants, as well as to the other participants in the reorganizations, parties interested in the debtor, and the statutory policies of reorganization. The reorganization has included several notable achievements and credit for each was claimed by many, but it has been aptly observed that "Success has a hundred fathers; failure is an orphan."

The above listed fees and expenses which this Court believes are reasonable and fair compensation shall constitute the ORDER of this Court in the captioned proceeding.

Dated: May 16, 1967.

Judge, United States District Court

APPENDIX F

Relevant Statutes

11 U.S.C.A. § 102

§ 102. *Expenses of administering estates; unauthorized sharing of fees; withholding allowances*

(a) (1) The actual and necessary costs and expenses incurred by officers, other than referees, in the administration of estates shall, except where other provisions are made for their payment, be reported in detail under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

(2) The actual and necessary office and other expenses of referees shall be allowed when authorized and approved by the Director, including compensation of clerical, stenographic and other assistants of referees at rates to be fixed by the Director, taking into consideration the rates for comparable services prevailing in the respective offices of the clerks of the several district courts, and the costs of establishing and maintaining their offices with equipment and supplies adequate for their efficient and economical operation, including mechanical equipment and devices and law libraries. Such expenses may be allowed when authorized by a judge of the judicial district or districts in which a referee serves in cases of emergency where it is not feasible to secure prior authorization of the Director. The Director, with the approval of the conference, may prescribe such rules and regulations as may be necessary for the purpose of carrying out the provisions of this paragraph.

(3) When, in the opinion of the Director, the public interest requires it, he may, on the recommendation of a referee, which recommendation shall state facts showing the necessity for the same, allow the referee to employ necessary clerical, stenographic, and other assistants. The referee may at his pleasure remove any assistant in his employ. If the office of a referee shall become vacant, the employment of his assistants shall not thereupon be terminated: *Provided, however,* That during such vacancy the Director may terminate the employment of any assistant, if, in his opinion, the services of such assistant are no longer needed.

(4) Referees and special masters under this title shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices in proceedings under this title.

(b) (1) When authorized and approved by the Director, the actual expenses of travel, and the actual expenses for lodging and subsistence not to exceed $7 per day, shall be allowed a referee while absent from his regular place of office on official business.

(2) When authorized and approved by the Director, the assistants of referees shall be entitled to the same travel allowances as are provided for employees of the executive branch of the United States Government under the standardized Government travel regulations issued by the President, while absent from their regular place of employment on official business.

(3) Payment of the expenses allowed or per diem granted under this subdivision and paragraph (2) of subdivision (a) of this section shall be by or pursuant to the order of the Director.

(c) A custodian, receiver, or trustee or the attorney for any of them, or any other attorney, rendering services in a proceeding under this title or in connection with such proceeding, shall not in any form or guise share or agree to share his compensation for such services with any person not contributing thereto, or share or agree to share in the compensation of any person rendering services in a proceeding under this title or in connection with such proceeding, to which services he has not contributed: *Provided, however,* That an attorney-at-law may share such compensation with a law partner or with a forwarding attorney-at-law, and may share in the compensation of a law partner.

(d) A receiver or trustee or the attorney for any of them, or any other attorney, seeking compensation for services rendered by him in a proceeding under this title or in connection with such proceeding, shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested, and what allowances, if any, have theretofore been made to him. Such petition shall be accompanied by his affidavit stating whether an agreement or understanding exists between the petitioner and any other person for a division of compensation and, if so, the nature and particulars thereof. If satisfied that the petitioner has, in any form or guise, shared or agreed to share his compensation or in the compensation of any other person contrary to the provi-

sions of subdivision (c) of this section, the court shall withhold all compensation from such petitioner. July 1, 1898, c. 541, § 62, 30 Stat. 562; June 22, 1938, c. 575, § 1, 52 Stat. 872; June 28, 1946, c. 512, § 11, 60 Stat. 329; July 7, 1952, c. 579, § 17, 66 Stat. 426.

11 U.S.C.A. § 641

§ 641. *Petitioning creditors; court officers; attorneys therefor*

The judge may allow reimbursement for proper costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter—

(1) by a referee;

(2) by a special master;

(3) by the trustee and other officers, and the attorneys for any of them;

(4) by the attorney for the debtor; and

(5) by the attorney for the petitioning creditors.

Such compensation of referees and trustees shall not be governed by sections 68 and 76 of this title. July 1, 1898, c. 541, § 241, as added June 22, 1938, c. 575, § 1, 52 Stat. 900.